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2970

No. 15099

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS, GUIDED MISSILE LODGE
1254, Respondent.

Transcript of Record

Petition for Enforcement of An Order of the
National Labor Relations Board

FILED

JUL -6 1956

PAUL P. O'BRIEN, CLERK



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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

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1254, Respondent.

Transcript of Record

Petition for Enforcement of An Order of the
National Labor Relations Board

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GENERAL COUNSEL'S EXHIBIT No. 1-A

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Case No.: 21-CB-561. Date Filed: 2/1/54.

1. Labor Organization or its Agents Against Which Charge Is Brought: Name: International Association of Machinists, Guided Missile Lodge 1254.

Address: 637 W. 2nd Street, Pomona, California.

The above-named organization or its agents has engaged in and is engaging in unfair labor practices within the meaning of Section (8b) Subsections 1 (A) and (2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

The above-named labor organization, acting through its officers, agents, or employees, on or about January 15, 1954, caused or attempted to cause an employer, Consolidated Vultee Aircraft Corporation, Guided Missile Division, Pomona, California, to discharge the undersigned in violation of Section 8 (b) (2).

By these and by other acts, said labor organization, acting through its officers, agents, and employ-

ees, restrained or coerced employees, including the undersigned, in the exercise of the rights guaranteed in Section 7 of the Act.

3. Name of Employer: Consolidated Vultee Aircraft Corporation, Guided Missile Division.

4. Location of Plant Involved: P. O. Box 1011, Pomona, California.

5. Nature of Employer's Business: Mfg. Guided Missiles.

6. No. of Workers Employed: 3000.

7. Full Name of Party Filing Charge: Charles E. Pense.

8. Address of Party Filing Charge: 190 W. Kingsley Ave., Pomona, California.

9. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By C. E. PENSE,
An Individual

February 1, 1954.

Affidavit of Service by Mail and Return Postal Receipts Attached.

GENERAL COUNSEL'S EXHIBIT No. 1-B

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 21-CA-1911. Date Filed: 2/1/54.

1. Employer Against Whom Charge Is Brought:

Name of Employer: Consolidated Vultee Aircraft Corporation, Pomona Division.

Number of Workers Employed: 3000.

Address of Establishment: P. O. Box 1011, Pomona, California.

Type of Establishment: Factory.

Identify principal product or service: Guided Missile.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), Subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

On or about January 15, 1954, the above named employer, acting through his officers, agents, or employees, discharged the undersigned in violation of Section 8 (a) (3).

By these and other acts the above named employer, acting through his officers, agents, and em-

ployees, interfered with, restrained, or coerced employees, including the undersigned, in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge: Charles E. Pense.

4. Address: 190 W. Kingsley Ave., Pomona, California.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit: (An Individual).

* * * * *

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By C. E. PENSE,
An Individual

February 1, 1954.

Affidavit of Service by Mail and Postal Return Receipts Attached.

GENERAL COUNSEL'S EXHIBIT No. 1-E

United States of America

Before the National Labor Relations Board

Twenty-First Region

Case No. 21-CA-1911

In the Matter of

CONSOLIDATED VULTEE AIRCRAFT CORPORATION, POMONA DIVISION,

and

CHARLES E. PENSE, An Individual.

Case No. 21-CB-561

In the Matter of

INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED MISSILE LODGE 1254

and

CHARLES E. PENSE, An Individual.

**ORDER CONSOLIDATING CASES AND
NOTICE OF HEARING**

The General Counsel for the National Labor Relations Board having duly considered the matter and deeming it necessary in order to effectuate the purposes of the National Labor Relations Act, as amended, and to avoid unnecessary costs or delay,

Hereby Orders, pursuant to Section 102.33 (b) of the National Labor Relations Board Rules and Reg-

ulations, Series 6, as amended, that these cases be, and they hereby are, consolidated.

Please Take Notice that on the 24th day of May, 1954, at 10:00 a.m., in Room 704, 111 West Seventh Street, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Consolidated Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Copies of the Charges upon which the Consolidated Complaint is based are attached hereto.

You are further notified that, pursuant to Section 102.15 of the Board's Rules and Regulations, you shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the said Consolidated Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Consolidated Complaint shall be deemed to be admitted as true and may be so found by the Board.

In Witness Whereof, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Consolidated Complaint and Order Consolidating Cases and Notice of Hearing to be signed by the Acting Regional Director for the Twenty-First Region on this 30th day of April, 1954.

[Seal] /s/ GEO. A. YAGER,
Acting Regional Director, National Labor Relations
Board, Twenty-First Region.

Affidavit of Service by Mail and Return Postal
Receipts Attached.

GENERAL COUNSEL'S EXHIBIT No. 1-F

[Title of Board and Cause.]

CONSOLIDATED COMPLAINT

It having been charged by Charles E. Pense, hereafter called Pense, that Consolidated Vultee Aircraft Corporation, Pomona Division, hereafter called the Company, and International Association of Machinists, Guided Missile Lodge 1254, hereafter called the Union, have engaged in and are engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, Public Law 101, 80th Congress, First Session, hereinafter called the Act, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Consolidated Complaint and alleges as follows:

1. The Company is a division of Consolidated Vultee Aircraft Corporation, a Delaware corporation which is engaged in the manufacture, development, design and sale of military and commercial aircraft (including guided missiles), aircraft parts

and accessories in San Diego, California, Pomona, California, Fort Worth, Texas, and various other locations throughout the United States, and which is one of the largest aircraft manufacturing corporations in the United States. The Company is engaged in the manufacture of guided missiles for the armed forces of the United States and, during the past fiscal year, purchased raw materials and supplies valued in excess of \$1,000,000 outside the State of California. The operations of the Company and of Consolidated Vultee Aircraft Corporation have a substantial effect on national defense.

2. The Company and Consolidated Vultee Aircraft Corporation are, and at all times material herein have been, engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

3. The Union is a labor organization within the meaning of Section 2, subsection (5) of the Act.

4. During the period from August 1, 1953, until on or about February 1, 1954, the Company and the Union continued in effect and enforced a provision of a previously concluded collective bargaining contract which read in part as follows:

“Article XIV

Union Security

“Section 1. Any employee within the bargaining unit who, on the effective date of this agreement, is a member of the Union in good standing, and each

employee within the bargaining unit who thereafter becomes a member of the Union shall pay while on the Company's active payroll and a member of the Union, initiation fees, monthly dues and general assessments levied by the International Association of Machinists, Guided Missile Lodge No. 1254, in accordance with the constitution and by-laws of the Union as a condition of employment while in the bargaining unit, provided that in no event shall the initiation fee, monthly dues or general assessment exceed the amount specified in the constitution and by-laws; and each employee who, after the effective date of this agreement, is separated from the bargaining unit and who at such time is subject to the provisions of this section shall, upon rehire within the bargaining unit, again pay regular dues to the Union commencing with the date of rehire; provided, further, that any employee may withdraw from membership in the Union by notifying the Union and the Company by registered mail, post-marked between August 1 to August 15 of the then currently effective yearly period.

"Section 2. No employee, as a condition of employment while in the bargaining unit, shall be required to pay while on the Company's active payroll any Union membership dues, fees or general assessments covering any period during which the employee was not in the bargaining unit or was not on the Company's active payroll.

"Section 3. Any employee subject to the provisions of Section 1 above, who is thereafter separated

from the bargaining unit, shall upon his re-employment in a job within the bargaining unit again pay membership dues to the Union in accordance with Section 1 above, unless such employee has withdrawn from membership with the Union in accordance with this Article."

5. On or about December 1, 1953, the Union canceled the membership of Pense in the Union allegedly for the reason that Pense was delinquent in his payment of dues to the Union for more than 3 months, and on or about January 14, 1954, and continuously since that date, the Union has refused to reinstate him to membership in the Union. During the period from on or about September 1, 1953, to on or about January 1, 1954, the Union failed to cancel the membership in the Union of other employees of the Company who were delinquent in their dues payments to the Union for more than 3 months, and during the period from on or about December 1, 1953, to on or about February 1, 1954, reinstated to membership in the Union other employees of the Company who were delinquent in their dues payments to the Union for more than 3 months. This disparity between the treatment accorded by the Union to Pense and the treatment accorded by the Union to said other employees was due to the fact that Pense had assisted other employees of the Company to prepare, in accordance with the provisions of the contract then in effect between the Company and the Union, revocations of their previously given authorizations to the Company to deduct their union dues, initiation fees and assessments from their pay.

6. On or about December 7, 1953, the Union requested and demanded of the Company to discharge Pense from its employment, and since that date the Union has persisted in its request and demand not to reinstate or reemploy Pense, these requests and demands allegedly being predicated on the reason that Pense was delinquent in his payment of dues to the Union and had forfeited his membership in the Union.

7. On or about January 15, 1954, the Company acceded to said request and demand of the Union and discharged Pense from its employment, and, since that date, the Company, acceding to the Union's request and demand, has refused, and continues to refuse, to reinstate or reemploy Pense for the sole reason that the Union had requested and required his discharge.

8. By the acts and conduct set forth in paragraph 4 the Company continued in effect and enforced a contractual provision which makes the payment of assessments a condition of employment and which requires as a condition of employment in respect to certain employees of the Company membership in the Union prior to the thirtieth day following the beginning of their employment or reemployment in a job within the bargaining unit and prior to the thirtieth day following the effective date of the contract, which contractual provision is therefore in violation of Section 8 (a) (3) of the Act, and the Company thereby discriminated in regard to tenure of employment to encourage membership in

the Union and interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and thus engaged in unfair labor practices within the meaning of Sections 8 (a) (1) and 8 (a) (3) of the Act.

9. By the acts and conduct set forth in paragraph 4 the Union continued in effect and enforced a contractual provision which makes the payment of assessments a condition of employment and which requires as a condition of employment in respect to certain employees of the Company membership in the Union prior to the thirtieth day following the beginning of their employment or reemployment in a job within the bargaining unit and prior to the thirtieth day following the effective date of the contract, which contractual provision is therefore in violation of Section 8 (a) (3) of the Act, and the Union thereby caused the Company to discriminate against employees in violation of Section 8 (a) (3) of the Act, and restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act and thus engaged in unfair labor practices within the meaning of Sections 8 (b) (1) (A) and 8 (b) (2) of the Act.

10. By making and persisting in the requests and demands set forth in paragraph 6, while there was not in effect between the Company and the Union, a valid and lawful contractual provision requiring membership in the Union as a condition of employment, the Union caused, and is now causing, an employer to discriminate against an employee in viola-

tion of Section 8 (a) (3) of the Act, and restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and it thereby engaged, and is now engaging, in unfair labor practices within the meaning of Sections 8 (b) (2) and 8 (b) (1) (A) of the Act.

11. By making and persisting in the requests and demands set forth in paragraph 6, while, as set forth in paragraph 5, according Pense treatment disparate from that accorded other employees of the Company, the Union caused, and is now causing, an employer to discriminate against an employee to whom membership in the Union was not available on the same terms and conditions generally applicable to other members and with respect to whom membership in the Union has been terminated and denied on grounds other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership, and restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, and the Union thereby engaged, and is now engaging, in unfair labor practices within the meaning of Sections 8 (b) (2) and 8 (b) (1) (A) of the Act.

12. By acceding to the requests and demands of the Union and discharging Pense, as set forth in paragraph 7, while there was not in effect between the Company and the Union a valid and lawful contractual provision requiring membership in the Union as a condition of employment, the Company discriminated, and is now discriminating, against an

employee in tenure of employment to encourage membership in the Union, and interfered with, restrained and coerced, and is now interfering, restraining and coercing, employees in the exercise of the rights guaranteed in Section 7 of the Act, and it thereby engaged, and is now engaging, in unfair labor practices within the meaning of Sections 8 (a) (1) and 8 (a) (3) of the Act.

13. The acts and conduct of the Company and of the Union set forth and described in paragraphs 4 through 12 above, occurring in connection with the business of the Company as described above, have a close, intimate and substantial relation to commerce as defined in Section 2, subsection (6) of the Act and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce as defined in Section 2, subsection (7) of the Act.

14. The acts and conduct of the Company and of the Union set forth and described in paragraphs 4 through 12 above, occurring in connection with the business of the Company as described above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a), subsections (1) and (3), Section 8 (b), subsections (1) (A) and (2), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director for the Twenty-First Region, this 30th day of April, 1954, issues this Con-

solidated Complaint against the Company and the Union.

[Seal] GEO. A. YAGER,
Acting Regional Director, National Labor Relations
Board, Twenty-First Region.

Affidavit of Service by Mail and Postal Return
Receipts Attached.

GENERAL COUNSEL'S EXHIBIT No. 1-L

[Title of Board and Cause.]

ANSWER TO COMPLAINT BY
RESPONDENT UNION

Comes now the International Association of Machinists for itself and in behalf of its Guided Missile Lodge 1254, Respondent Union, in the above entitled matter with its answer to the allegations set forth in the Consolidated Complaint.

In general, the Respondent Union denies each and every, any and all, allegations or charges that it has or that it is engaged in unfair labor practices either by itself or in collusion with or in cooperation with Respondent Employer.

The Union answers hereinafter the itemized and numbered allegations in the Consolidated Complaint in the same order, identifying the answer by the same numeral used in the Complaint as follows:

1. The Union is without accurate knowledge as to the financial and manufacturing data of the Company, and is, therefore, unable to admit or deny the

allegations in Paragraph 1 of the Consolidated Complaint.

2. The Union for the reason set forth in 1 above denies the allegations of commerce—in so doing, however, we do not raise the question of jurisdiction of the Board as defense.

3. The Union admits it is a Labor Organization within the meaning of Section 2, Subsection (5) of the Act.

4. The Union admits that its Collective Bargaining Agreement with Respondent Company contained the provisions as alleged.

5. The Union denies the allegations, implications, and distortions of facts set forth in this Paragraph of the Complaint, and denies generally and specifically the conclusions drawn by the General Counsel from the alleged facts.

The Union admits that Pense automatically cancelled his membership including all his rights, privileges, and benefits derived therefrom in accordance with the laws of the Union by reason of his failure to pay the dues uniformly required prior to December 1, 1953.

The ambiguous allegations by the General Counsel contained in the sentence:

“During the period from on or about September 1, 1953, to on or about January 1, 1954, the Union failed to cancel the membership in the Union of other employees of the Company who were delinquent in their dues payments to the Union for more than 3 months, and during the period from on or about December 1, 1953, to on or about February

1, 1954, reinstated to membership in the Union other employees of the Company who were delinquent in their dues payments to the Union for more than 3 months."

poses a serious question for Respondent Union because we do not know, what members, if any so exist, as described, the General Counsel is referring to, nor can we ascertain what disparity exists for what reasons until and unless we know what members the General Counsel refers to and relies on to support his allegations.

6. The Union admits that it requested the discharge of Pense in accordance with the terms and provisions of the Agreement between the Company and the Union then in effect, and denies that it has persisted and demanded that the Company decline to reinstate and re-employ Pense for any reason whatsoever.

7. The Union believes that Pense was terminated on or about January 15, 1954, but denies that any actions by the Company since that time in connection with Pense is in any manner related to a Union request or demand. Respondent Union denies that it has knowledge of the Company's motives or reasons for any acts performed by the Company.

8. & 9. The Union denies generally and specifically all the allegations, implications, and conclusions that the Company or the Union in any way, manner, or form violated any section of the Act and averse by way of an affirmative defense that a valid and legal agreement was in force and effect and that the question of an assessment is not

an issue in this case; that all acts by either the Company or the Union in connection with the termination of Pense was proper and legal in all respects.

10. The Union denies generally and specifically that it has caused the Company to discriminate against Pense or any other employee, or that it caused any violation of any section of the Act.

11. The Union is without knowledge as to what disparate treatment the General Counsel is referring to or relying on as the basis of any allegations of discrimination, and urges that disparate treatment as such is not per se violative of the Act.

The Union denies any and all allegations, implications, or conclusions that infer that membership in the Union was not available on the same terms and conditions generally applicable to other members or persons who have been similarly classified or are similarly situated, or infer that Pense was terminated on grounds other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. The Union denies that it has in any way violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act.

12. The Union denies that it has any knowledge of any acts by the Company that would be violative of Section 8 (a) (1) and 8 (a) (3) of the Act.

13. The Union denies that the acts and conduct described in Paragraphs 4 through 12, even if true, would have an intimate and substantial relations to commerce or that it would lead or tend to lead to

labor disputes that would burden or obstruct commerce or the free flow of commerce.

14. The Union denies that any or all of the allegations, implications, or conclusions advanced by the General Counsel in the Complaint as a whole constitutes unfair labor practices which have any effect whatsoever upon commerce within any sections of the Act.

Respectfully submitted,

/s/ A. C. McGRAW,

Grand Lodge Representative, International Association of Machinists, for Itself and in Behalf of Its Subordinate Local Lodge 1254.

Duly verified.

Proof of Service by Mail Attached.

GENERAL COUNSEL'S EXHIBIT No. 1-M

[Title of Board and Cause.]

ANSWER OF RESPONDENT

The Respondent answering the complaint herein, hereby admits, avers and denies, as follows:

I.

Answering paragraphs 1 and 2 of the Complaint herein, the Respondent, General Dynamics Corporation, admits the allegations therein contained in so far as said allegations relate to the business and affairs of its Convair Division and specifically avers as follows:

Consolidated Vultee Aircraft Corporation for a number of years up to April 30, 1954, was primarily engaged in the manufacture, development, design and sale of military and commercial aircraft, missiles, aircraft parts and accessories. The General Offices of Consolidated Vultee Aircraft Corporation were located at San Diego, California, with various manufacturing Divisions located as follows:

Pomona Division—Pomona, California .

San Diego Division—San Diego, California

Fort Worth Division—Fort Worth, Texas

Daingerfield Division—Daingerfield, Texas

Effective as of the close of business April 30, 1954, Consolidated Vultee Aircraft Corporation, a Delaware corporation, merged with and into General Dynamics Corporation, a Delaware corporation, the surviving corporation to be known as General Dynamics Corporation. Said merger was effected in accordance with the Statutes of the State of Delaware and resulted in the transfer of all Consolidated Vultee Aircraft Corporation rights, privileges, business, property, assets, etc., to, and the assumption of all Consolidated Vultee Aircraft Corporation obligations and liabilities by, General Dynamics Corporation. Following said merger the activities and business of Consolidated Vultee Aircraft Corporation were, by resolution of the Board of Directors, designated as "Convair, a Division of General Dynamics Corporation". The activities and business of Convair, a Division of General Dynamics Corporation (hereinafter called "Convair") con-

tinued uninterrupted the same after the aforesaid merger. The General Offices of Convair continued and are now located at San Diego, California, and so far as the subject matter of this action is concerned the various operating divisions of Convair continue in all respects the same.

Specifically, Convair's Pomona division, between January 1, 1954 and June 30, 1954, purchased raw materials and supplies valued in excess of \$5,000,000.00. In excess of 75% of such raw materials and supplies were purchased from suppliers located outside the State of California and shipped by said suppliers to Pomona, California. During this same period sales of the said Pomona division exceeded the dollar value of \$18,000,000.00. Approximately 99% of such sales were made to the Government and ultimately shipped outside the State of California.

Respondent admits that its Convair Division is the same business operation as that referred to in the complaint as "Consolidated Vultee Aircraft Corporation."

The Pomona division of Convair is engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the National Labor Relations Act.

II.

Answering paragraph 3 of the Complaint herein, Respondent is without specific knowledge or information as to allegations therein contained, but based upon its information and belief admits the Interna-

tional Association of Machinists, Guided Missile Lodge 1254 is a labor organization within the meaning of Section 2, subsection (5) of the National Labor Relations Act.

III.

Answering paragraph 4 of the Complaint herein, Respondent admits the allegations therein contained.

IV.

Answering paragraph 5 of the Complaint herein, Respondent denies any knowledge of or responsibility for any alleged disparity of treatment by the International Association of Machinists, Guided Missile Lodge 1254 to Charles E. Pense; Respondent makes no further answer to paragraph 5 of the Complaint herein since no statements or allegations therein contained refer to acts of Respondent.

V.

Answering paragraph 6 of the Complaint herein, Respondent admits that on or about December 8, 1953, it received the following written request from the International Association of Machinists, Guided Missile Lodge 1254:

“The International Assn. of Machinists Guided Missile Lodge 1254 is hereby notifying Consolidated Vultee Aircraft Corp. Pomona Division, co-signers of the present contract between the union and the company; that former Union Members, D. M. Ainsworth Department 25 Clock Number 10341 and C. E. Pense, Department 27 Clock Number 70053,

have not complied with said contract, as a Condition of Employment. Therefore in compliance with the Constitution of the International Assn. of Machinists have been dropped from this local.

“The union will await your compliance to the above subject set forth.”

that on or about December 17, 1953, Respondent received the following written request from said Lodge 1254;

“The International Association of Machinists Guided Missile Lodge #1254 is hereby notifying Consolidated Vultee Aircraft Corp., Pomona Division, co-signers of the present contract between the Union and the company, that former Union members, D. M. Ainsworth, Department 25, Clock Number 10341 and C. E. Pense, Department 27, Clock Number 70053, are not in compliance with Article XIV of our Agreement in that they have been dropped from membership of our Association because of non-payment of dues in accordance with the Constitution and By-Laws of our Union.

“We, therefore, request the company to immediately terminate the above employees in accordance with the terms of our Agreement.”

that on or about January 15, 1954, Respondent received the following written request from said Lodge 1254;

“In regards to the letter sent to you dated December 17, 1953 in which Guided Missile Lodge

1254, International Association of Machinists asked you to terminate former Union Members, D. M. Ainsworth and C. E. Pense as a Condition of Employment in accordance with the terms of our Agreement.

“I wish to advise you that action was taken by the membership of this lodge at the last meeting held January 14, 1954 and the decision set forth which is in accordance with the Constitution and By-Laws of our Union as follows:

“D. A. Ainsworth, Application accepted and Reinstated as a member in good standing. Termination Request Cancelled.

“C. E. Pense, Application rejected by the membership. Termination requested as per letter dated December 17, 1953”

VI.

Answering paragraph 7 of the Complaint herein, Respondent admits that on January 15, 1954 it discharged Charles E. Pense at the request of the International Association of Machinists, Guided Missile Lodge 1254, and upon its representation that said Charles E. Pense had declined and failed to pay Union dues in compliance with Article XIV of the collective bargaining agreement then in effect between the Respondent and said Lodge 1254; Respondent further admits that since January 15, 1954 it has refused to reinstate Charles E. Pense for the sole reason that said Lodge 1254 had requested it to discharge Charles E. Pense because of his failure to pay Union dues in compliance

with Article XIV of the collective bargaining agreement then in effect between the Respondent and said Lodge 1254.

VII.

Answering paragraph 8 of the Complaint herein, Respondent denies that its conduct set forth in paragraph 4 is in violation of Section 8(a)(3) of the National Labor Relations Act and further denies that it thereby discriminated in regard to tenure of employment to encourage membership in a Union and interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act and thus engaged in unfair labor practices within the meaning of Section 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

VIII.

Answering paragraph 9 of the Complaint herein, Respondent denies the premise upon which the allegations thereof are based, i.e. that the provisions of the collective bargaining agreement in effect between Respondent and International Association of Machinists, Guided Missile Lodge 1254 were and are in violation of the National Labor Relations Act; Respondent makes no further answer to paragraph 9 of the Complaint herein since no statements or allegations therein contained refer to acts of Respondent.

IX.

Answering paragraph 10 of the Complaint herein,

Respondent denies the premise upon which the allegations thereof are based, i.e. that in December of 1953 there was not in effect between Respondent and International Association of Machinists, Guided Missile Lodge 1254 a valid and lawful collective bargaining agreement; Respondent makes no further answer to paragraph 10 of the Complaint herein since no statements or allegations therein contained refer to acts of Respondent.

X.

Respondent makes no answer to paragraph 11 of the Complaint herein since no statements or allegations therein contained refer to acts of Respondent.

XI.

Answering paragraph 12 of the Complaint herein, Respondent admits that it discharged Charles E. Pense on January 15, 1954, pursuant to the request of the International Association of Machinists, Guided Missile Lodge 1254 upon its representation said Charles E. Pense had declined and failed to pay Union dues in compliance with Article XIV of the collective bargaining agreement then in effect between Respondent and said Lodge 1254; Respondent denies the allegation that there was not in effect between the Company and the Union at that time a valid and lawful contractual provision requiring employees within the bargaining unit who, on the effective date of the agreement, were members of said Lodge 1254 in good standing, to pay

monthly dues to said Lodge 1254 in accordance with the constitution and by-laws of said Lodge 1254, and that same should be a condition of employment while said employees were in the bargaining unit; Respondent further denies that in discharging Charles E. Pense on January 15, 1954, it discriminated, and is now discriminating, against an employee in tenure of employment to encourage membership in said Lodge 1254, and interfered with, restrained and coerced, and is now interfering, restraining and coercing, employees in the exercise of the rights guaranteed in Section 7, of the National Labor Relations Act, and thereby engaged in, and is now engaging, in unfair labor practices within the meaning of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.

XII.

Answering paragraph 13 of the Complaint herein, Respondent denies that its acts and conduct set forth and described in paragraphs 4 through 12 of the Complaint herein, have led and tend to lead to labor disputes as therein alleged.

XIII.

Answering paragraph 14 of the Complaint herein, Respondent denies that its acts and conduct set forth and described in paragraphs 4 through 12 of the Complaint herein, constitute unfair labor practices affecting commerce within the meaning of Section 8(a), subsections (1) and (3), Section 8(b),

subsections (1)(A) and (2), and Section 2, subsections (6) and (7) of the National Labor Relations Act.

XIV.

Respondent further avers that the collective bargaining agreement referred to in paragraph 4 of the Complaint herein in effect during the period from August 1, 1953 until on or about February 1, 1954, was entered into by Respondent and International Association of Machinists, Guided Missile Lodge 1254 in good faith with the intent that same should be consistent with the concept and purposes of the National Labor Relations Act and not in violation thereof. Specifically, the provisions of said agreement pertinent to the discharge of **Charles E. Pense**, alleged in the Complaint herein to have been discharged in violation of the National Labor Relations Act, required employees within the bargaining unit covered, who on the effective date of said agreement were members of said Lodge 1254 in good standing, to pay while on the Company's active payroll and a member of the Union, monthly dues levied by the said Lodge 1254 in accordance with its constitution and by-laws.

Respondent further avers that Charles E. Pense was employed by it during all times mentioned in the Complaint herein and until January 15, 1954, that he was within the bargaining unit covered by said collective bargaining agreement and was a member of said Lodge 1254 on the effective date of said agreement.

Respondent further avers that it was advised by said Lodge 1254 in writing prior to January 15, 1954 that Charles E. Pense had failed to pay reasonable Union dues in accordance with the constitution and by-laws of said Lodge 1254 and in fact was far in arrears in the payment of such dues and, pursuant to request of said Lodge 1254, Respondent did on the 15th day of January, 1954, discharge Charles E. Pense for the reason that he had failed to pay reasonable Union dues in accordance with the constitution and by-laws of said Lodge 1254 in compliance with the said collective bargaining agreement then in effect, and for no other reason.

Wherefore, Respondent requests that the Complaint herein be dismissed in so far as its alleges and charges acts on the part of Respondent in violation of the National Labor Relations Act.

Dated: July 9, 1954.

GENERAL DYNAMICS
CORPORATION

By.....

Robert B. Watts,
Vice President and General Counsel,
Convair Division.

[Title of Board and Cause.]¹

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Ernest L. Heimann, for the General Counsel.
Robert B. Watts and C. C. Sawyer, of San Diego,
Calif., and Harlan Filloon, of Pomona, Calif., for
the Respondent Corporation. A. C. McGraw, of Los
Angeles, Calif., for the Respondent Union.

Before: James R. Hemingway, Trial Examiner.

Statement of the Case

Upon charges filed by Charles Pense against Consolidated Vultee Aircraft Corporation, Pomona Division, now known as General Dynamics Corporation, Convair Division (Pomona), herein called the Company, and against International Association of Machinists, Guided Missile Lodge 1254, herein called the Union, a consolidated complaint was issued on April 30, 1954, by the Acting Regional Director for the Twenty-first Region of the National Labor Relations Board, herein called the Board, on behalf of the General Counsel for the Board, alleging violations by the Company of Section 8 (a) (1) and (3), and by the Union of Section 8 (b) (1) (A)

¹ The complaint was amended on motion made and granted at the hearing to reflect the change in the name of the Respondent Corporation. It is now known as General Dynamics Corporation, Convair Division (Pomona), but as all the records of the case have been set up under the original name, I have retained the original caption for convenience.

and (2) of the National Labor Relations Act, as amended, 61 Stat. 136, herein called the Act. The respective respondents were served with copies of the charges against them, copies of the complaint, and notice of hearing.

In substance the complaint alleges that during the period from August 1, 1953, to about February 1, 1954, the Company and the Union continued in effect a certain union-security provision of a previously concluded collective-bargaining agreement making payment of assessments by the Union, in addition to initiation fees and dues, a condition of employment, and requiring as a condition of employment of certain employees membership in the Union prior to the thirtieth day following the beginning of their employment or re-employment in a job within the bargaining unit and prior to the thirtieth day following the effective date of the contract; that on about December 1, 1953, the Union canceled the membership of Charles E. Pense in the Union purportedly for being more than 3 months delinquent in payment of union dues and refused from January 14, 1954, to reinstate him to membership although the Union had, from September 1, 1953, to about January 1, 1954, failed to cancel the membership of other employees of the Company who were more than 3 months delinquent in dues and during the period from about December 1, 1953, to about February 1, 1954, reinstated to membership other employees of the Company who were delinquent in dues payments for more than 3 months; that this disparity of treatment between

Pense and other employees was due to the fact that Pense had assisted other employees of the Company to prepare, in accordance with the provision of the contract then in effect between the Union and the Company, revocations of previously given authorizations to deduct union dues, initiation fees, and assessments from their pay; that on about December 7, 1953, the Union requested and demanded that the Company discharge Pense allegedly for having forfeited his membership for delinquency in payment of dues; that the Company on about January 15, 1954, acceded to the Union's request and discharged Pense and thereafter, on the Union's request and demand, refused to reinstate Pense for the sole reason that the Union had requested and required his discharge.

The answer of the Union, dated June 1, 1954, in substance admitted the alleged union-security provisions in the contract, admitted that it had requested the discharge of Pense in accordance with the terms thereof, but denied that it had persisted in a demand that the Company decline to reinstate and re-employ Pense for any reason and in general denied the alleged unfair labor practices. The answer of the Company, dated July 9, 1954, admitted that, at the Union's request, it had on January 15, 1954, discharged Pense upon the Union's representation that Pense had declined and failed to pay dues required under the terms of the aforesaid union security clause of the contract, and that it had since that date refused to reinstate Pense for

the same reason. The Company's answer denied the commission of any unfair labor practices.

Pursuant to notice, a hearing was held at Los Angeles, California, on July 12 and 13, 1954, before me as the duly designated Trial Examiner. The General Counsel and the Company were represented by counsel, and the Union was represented by its Grand Lodge Representative. All participated in the hearing and were afforded full opportunity to examine and cross-examine witnesses and to introduce evidence bearing upon the issues. At the opening of the hearing the Company made a motion to substitute the name of General Dynamics Corporation for that of Consolidated Vultee in the pleadings and the motion was granted. At the close of the hearing the Union made a motion to dismiss the complaint as to it. Ruling was reserved and is now denied for the reasons stated herein. Time was granted within which to file briefs. Briefs were received from the General Counsel and the Union and have been considered.

From my observation of the witnesses and upon the entire record in the case, I make the following:

Findings of Fact

I. The business of the Company

Consolidated Vultee Aircraft Corporation for a number of years up to April 30, 1954, was primarily engaged in the manufacture, development, design and sale of military and commercial aircraft, missiles, aircraft parts and accessories. The general of-

fices of Consolidated Vultee Aircraft Corporation were located at San Diego, California, with manufacturing divisions located in that city, in Pomona, California, Fort Worth, and Daingerfield, Texas.

Effective as of the close of business on April 30, 1954, Consolidated Vultee Aircraft Corporation, a Delaware corporation, merged with and into General Dynamics Corporation, a Delaware corporation, the surviving corporation being known by the latter name. This merger was effected in accordance with the statutes of the State of Delaware and resulted in the transfer of all Consolidated Vultee Aircraft Corporation rights, privileges, business, property, assets, etc., to, and the assumption of all Consolidated Vultee Aircraft Corporation obligations and liabilities by, General Dynamics Corporation. Following the aforesaid merger, the activities and business of Consolidated Vultee Aircraft Corporation were, by resolution of the Board of Directors, designated as "Convair, a Division of General Dynamics Corporation," hereinafter called Convair, or the Company. The activities and business of Convair continued uninterrupted after the merger in the same way as before. The general offices of Convair continued to be located at San Diego, California, and so far as the subject matter of this action is concerned the various operating divisions of Convair continue in all respects the same.

Convair's Pomona division, between January 1, 1954, and June 30, 1954, purchased raw materials and supplies valued in excess of \$5,000,000. More than 75 per cent of such raw materials and supplies

were purchased from suppliers located outside the State of California and were shipped by said suppliers to Convair at Pomona, California. During the same period of time sales of said Pomona division exceeded the value of \$18,000,000. Approximately 99 per cent of such sales were made to the United States Government and ultimately were shipped outside the State of California. The Company concedes and I find that it is engaged in commerce within the meaning of the Act.

II. The labor organization involved

The Union is a labor organization admitting to membership employees of the Company and representing such employees in collective bargaining with the Company.

III. The unfair labor practices

A. The union-security clause.

In the collective-bargaining contract between the Union and the Company in effect at all times during the period covered by the complaint was Article XIV, which, in part, reads as follows:

Union Security

Section 1. Any employee within the bargaining unit who, on the effective date of this agreement, is a member of the Union in good standing, and each employee within the bargaining unit who thereafter becomes a member of the Union shall pay while on the Company's active payroll and a member of the Union, initiation fees, monthly dues and general assessments levied by the International Association

of Machinists, Guided Missile Lodge No. 1254, in accordance with the constitution and by-laws of the Union as a condition of employment while in the bargaining unit, provided that in no event shall the initiation fee, monthly dues or general assessment exceed the amount specified in the constitution and by-laws; and each employee who, after the effective date of this agreement, is separated from the bargaining unit and who at such time is subject to the provisions of this section shall, upon rehire within the bargaining unit, again pay regular dues to the Union commencing with the date of rehire; provided, further, that any employee may withdraw from membership in the Union by notifying the Union and the Company by registered mail, post-marked between August 1 to August 15 of the then currently effective yearly period.

Section 2. No employee, as a condition of employment while in the bargaining unit, shall be required to pay while on the Company's active payroll any Union membership dues, fees or general assessments covering any period during which the employee was not in the bargaining unit or was not on the Company's active payroll.

Section 3. Any employee subject to the provisions of Section 1 above, who is thereafter separated from the bargaining unit, shall upon his re-employment in a job within the bargaining unit again pay membership dues to the Union in accordance with Section 1 above, unless such employee has withdrawn from membership with the Union in accordance with this Article.

It is contended by the General Counsel that the foregoing union-security provision is illegal and void because (1) it includes the requirement of payment of general assessments in addition to initiation fees and dues as a condition of employment, (2) it requires membership in the Union as a condition of employment of certain employees prior to the thirtieth day following the day of employment or re-employment and prior to the thirtieth day following the effective date of the contract.

With respect to the first contention, it was stipulated that the Union had never requested the Company to deduct any amount from the pay of any employee covering a general assessment and that the Union had never requested the Company to enforce by discharge or otherwise the provisions of Section XIV so far as they refer to the payment of general assessments. The determination of the legality of a contract does not, of course, depend upon whether or not anything illegal has been done in performance of it. A provision of an agreement which requires in the future the relinquishment of a right guaranteed in Section 7 of the Act may be just as illegal as one which requires a present relinquishment. But to say that the language is illegal, and hence, void, is not necessarily equivalent to saying that the use of the language was the commission of an unfair labor practice. Section 8 (a) (3) requires a discrimination as an element of the unfair labor practice and not the bare potentiality of one. The mere existence of a setting in which a discrimination could occur upon the occurrence of

another event—the levying of an assessment—does not, itself, constitute discrimination. Section 8 (b) (2), on the other hand, does not require that there be an actual discrimination as proof of the unfair labor practice there covered. It is sufficient that there be an attempt to cause discrimination. But does the mere inclusion of the word “assessments” in the union-security clause constitute an attempt to cause such discrimination? The verb “attempt” is defined, in Webster’s dictionary: “To make trial or experiment of; try; endeavor to do * * *.” The use of the word “assessments” in the contract prepares the foundation for the attempt, but the act constituting the endeavor is lacking. In those cases where the Board has found unfair labor practices by the employer and union in the very execution of an unauthorized union-security agreement, it may be noted that the interference, restraint, and coercion and likewise the discrimination occurs the moment the contract is executed, because the contract applies to certain employees, if not all, requiring that they immediately (or within less than the statutory grace period required to be given) do something that Section 7 of the Act guarantees they shall be free to refrain from doing.² It may be argued that, in those cases where employees, under a union shop clause, are given a grace period which is shorter

² E.g., *New York State Employers Association, Inc.*, 93 NLRB 127 and cases there cited; *Heating, Piping and Air Conditioning Contractors, etc.*, 102 NLRB 1646.

than the one required by the Act, the contract has future rather than immediate application, but its execution is, nevertheless, held to be a violation of Section 8 (a) (1) and (3) and of 8 (b) (1) (A) and (2) of the Act; so the mere fact that the requirement for payment of assessment in the instant contract is future rather than present should not distinguish the case. It is not the futurity of application of the agreement alone which distinguishes the present case. Rather it is the fact that employment cannot be affected, and employees will not be required to do that which they have a right to refrain from doing, unless a certain condition occurs which is not certain to occur. Lapse of time alone is certain to occur; the levying of an assessment is not. The complaint alleges that the use and continuation of the word "assessments" in the union security clause constituted a violation not only of Section 8 (a) (3) and 8 (b) (2) but also of Sections 8 (a) (1) and 8 (b) (1) (A) of the Act by the Company and the Union, respectively. Without the levying of an assessment, what coercion is there? The language alone exerts no compulsion on employees as does a contract requirement of membership within 30 days as a condition of employment. Until the levying of an assessment no employee is compelled to do anything which, under Section 7 of the Act, he has a right to refrain from doing. But wholly aside from the conditional aspects of the assessment, the provision for payment of assessments may be found to be no unfair labor practice.

Employees here are not required to join the Union with payment of assessments held over their heads as a condition of employment. The main purpose of the union-security clause here is maintenance of membership, where initial membership is voluntary, rather than closed or union shop, where it is not. It has been decided that no unfair labor practice occurs when an employee, who is already a union member at the time he is hired, is required, without grace period, to remain a member for the life of a maintenance-of-membership contract. ³ Obviously an employee may, by his voluntary act, relinquish his right to refrain from engaging in the activities enumerated in Section 7 of the Act. Thus, as an employee is not compelled to join the Union here, he may, by his voluntary act of joining, waive the protection he otherwise might have had.

I am not aware of any unfair labor practice case precisely like the one at hand, and I am not convinced that such cases as deal with the kind of unauthorized language involved here are controlling. The General Counsel cites several representation cases in his brief which hold that the requirement of payment of union assessments as a condition of employment goes beyond the scope of union-security clauses permitted by Section 8 (a) (3) of the Act and renders the contract illegal. Because of such illegality, the Board will not permit the con-

³ Wagner Iron Works, 94 NLRB 446.

tract to be a bar to an election. ⁴ The Act does not specifically authorize the requirement of payment of assessments as a condition of employment. In this sense it is illegal. But the use of the language alone is not a crime, a tort, nor, in my opinion, an unfair labor practice. I find, therefore, on the facts of this case, that no unfair labor practice was committed by the Company or the Union by virtue of the inclusion of assessments in addition to dues and initiation fees in the language of the contract. By the agreement of February 1, 1954, the requirement of payment of assessments was removed; so, except to the extent that the problem arises in connection with the discharge of Pense, the matter is relatively unimportant.

With respect to the second contention—that the union-security clause is illegal and void because it requires as a condition of employment, in respect to certain employees of the Company, membership in the Union prior to the thirtieth day following the beginning of their employment or re-employment and prior to the thirtieth day following the effective date of the contract—it will be noted that the union security here provided for is maintenance of membership rather than a union shop. By this agreement no one is obliged to join the Union who has not already done so, or does not, during the

⁴ International Harvester Co., 95 NLRB 730; Continental Can Co., Inc., 98 NLRB 1252; National Malleable and Steel Castings, 99 NLRB 737; John Deere Planter Works of Deere and Co., 107 NLRB No. 306.

term of the agreement, do so voluntarily. Ever since the Krause Milling Case, ⁵ it has been settled law that, as to existing union members, it is not necessary to provide, in the union-security clause, a 30-day escape period after the effective date of the contract. Since the 30-day requirement of the Act applies only to new employees, then, it becomes a question as to whether, in this case, new employees have been afforded this protection. As this is a maintenance of membership rather than union shop provision, employees never before employed would, of course, be subject to the union security clause only if they voluntarily joined the Union; so they are not required to join as a condition of employment. ⁶ The only serious question involved in this second contention, therefore, concerns the requirement of Article XIV of the contract that an employee who, being a member of the Union on leaving the bargaining unit, shall, upon re-employment in it later, pay dues thereafter during the term of the contract unless he has withdrawn from the Union in the one way, and at the one time, specified in the article—that is, by notifying the Union and the Company thereof by registered mail, post-

⁵ Charles A. Krause Milling Co., 97 NLRB 536.

⁶ Article XIV does not specifically refer to employees who, at the time they are hired, are already members of the same parent organization. But if they are required to transfer their membership to the Union and thereafter maintain it for the life of the contract, the agreement would not be illegal as to them. Wagner Iron Works, 94 NLRB 446.

marked between August 1 and 15 of the then currently effective yearly period. It is possible that the parties were contemplating only the case of employees who are transferred from the Pomona division to another division where they transfer their membership to a different lodge of the same parent organization and who are still members of the same parent organization at the time they are retransferred to the unit covered by the contract. The language of the agreement, however, is broad enough to cover a number of other situations. For example, an employee might resign from employment at some time other than between August 1 and 15 and might at that time notify the Union of his intent to withdraw from membership in the Union or, having resigned from employment, he might thereafter permit his membership to be automatically extinguished by failure to pay dues for 3 consecutive months in accordance with the Union's by-laws. Being no longer an employee, he is not covered by the contract and may withdraw his membership other than by the way provided by the contract. Even if an employee who is transferred by the Company from the unit here involved to another division retains his membership in the Union's parent organization at the time of transfer, he might thereafter resign from employment and terminate his membership, or, continuing in employment in another division of the Company withdraw from the Union while so employed. There is no evidence that a maintenance of membership agreement between the Company and a local of the

Union's parent organization applied to each division to which an employee might be transferred. But even if there were, the employee might withdraw from the union having such agreement, in accordance with the terms of the latter agreement. These terms, so far as it appears, would not necessarily be the same terms as those stated in the agreement here involved. And certainly there would be no reason to notify the Union after the employee had transferred his membership to another local. Hence, the employee might have withdrawn properly from the Union's parent organization and local at the place where he was employed and, being thereafter a nonunion employee, be transferred back to the unit here involved where he would again be obliged, under the terms of the contract under consideration to join the union at once because he was a member when he left the unit and did not withdraw from the Union in accordance with the provisions of Article XIV of the contract under consideration. An employee who, after terminating his membership in one of several ways indicated above, and who is re-employed by the Company within the bargaining unit while the contract, or an automatic extension of it, is, in effect, in the same situation as any new employee who is not a member of the Union. If a new employee is required to become a member of the Union, he must, under the Act, be given no less than 30 days from the date of his employment to join the Union. The same applies to transferees who are not union members. It may be argued that the requirement of Section 3 of

Article XIV of the contract is not one for union membership. The language is, “* * * shall again pay membership dues to the Union in accordance with Section 1 above * * *.” Membership dues are normally payable only by members. Section 1 of Article XIV of the contract requires dues payment to be made only by members. I construe the contract therefore, as meaning that employees who were members of the Union when they left the unit must again become members of the Union upon re-employment in the unit, without exception and without the statutory 30-day grace period, as a condition of employment. This provision does not conform to the requirements of Section 8 (a) (3) of the Act. There is evidence that employees were in fact transferred and that transferees made application to join the Union. It does not appear whether all the applications were for transfer alone or for new membership. In the latter case, so long as this clause existed in the contract, it cannot be determined that they joined the Union voluntarily. The tendency of the language is to compel membership. But even if the intent is merely to compel payment of union dues without requiring membership of such employees, the provision would still violate the Act, for it would coerce employees into doing that which under Section 7 of the Act they would have a right to refrain from doing. Hence, I find that by maintaining this provision in the agreement for the period of time covered by the complaint, ⁷ the

⁷ The same provision appears in the 1954 agreement.

Company has discriminated in regard to hire and tenure of employment of employees in violation of Section 8 (a) (3) of the Act, and the Union, by causing such discrimination, violated Section 8 (b) (2) of the Act. By the same conduct, the Company violated Section 8 (a) (1) of the Act and the Union violated Section 8 (b) (1) (A) of the Act.

B. The discrimination against Pense.

Charles Pense had been employed by the Company in San Diego, California, on March 9, 1951. He was transferred to the Pomona division on January 19, 1953, where he continued to be employed until the date of his discharge as hereinafter related. He was a member of the Union from about October 1, 1952, until the time he was automatically dropped from membership for nonpayment of dues in December 1953. Before he was transferred from San Diego, he had been a shop committeeman for the Union for a few months, and shortly after his transfer to Pomona he became a shop committeeman there until some time after August 1, 1953, when he ceased paying his union dues.

Section 4 of Article XIV of the contract provides that an employee may have his initiation fee, dues, and general assessments deducted from his pay if he desires by executing an authorization therefor. Following Section 7 of said Article is given the language of the authorization, which in its terms states the several ways in which the authorization may be canceled, one being by "written notice to

the Company, copy to the Union, * * * by registered mail dated by U. S. Post Office cancellation between August 1 * * * [and] August 15 of the then currently effective yearly period." It will be noticed that this period is the same as that for withdrawing from the Union.

On August 1, 1953, Pense borrowed a typewriter in the plant and typed the following letter:

Consolidated Vultee Aircraft Corp.,
Guided Missile (Pomona) Division
Pomona, California
Gentlemen:

Please accept this as your authority to discontinue payroll deduction of union dues from my weekly pay check effective as of August 1, 1953.

This is in accord with article 14 section "C" of our current working agreement⁸ and a copy of this notice is being forwarded to union headquarters, Pomona, California.

He mailed this to the Company and sent a copy to the Union, both by registered mail.

While Pense was typing his letter, several employees looked over his shoulder, read what he was typing, and asked questions about it. Some asked to borrow a copy of it so that they might write simi-

⁸ There is no section "C" of Article XIV of the contract, as such. The reference is to the paragraph of the authorization form quoted in that article which lists three ways in which the authorization may be canceled. The third, in paragraph "C", is by the kind of notice given by Pense.

lar letters. Those who could use the typewriter typed their own letters. A few who were unable to type asked Pense to do it for them, and he did.

As there was, at this time, another union seeking to establish itself in the plant, as quite a number of members canceled their dues deduction authorizations or memberships, and as some of the employees who had copied Pense's letter apparently believed they were withdrawing from the Union instead of just canceling their dues deduction authorization, the Union was displeased with Pense's action, and members in his department undertook to choose a new shop committeeman to replace Pense. Having heard rumors of Pense's action, Union President Hobb reported the matter to Angelo Ursino, Grand Lodge Representative and business agent of the Union, for investigation.

Section 14 of Article E of the constitution of the Union's parent organization provides that delinquency for 3 months in the payment of dues or assessments results automatically to cancel membership. Section 15 thereof provides in part:

Any person whose membership has been cancelled may be reinstated to membership, but the application for reinstatement must be made to the L. L. [local lodge] under whose jurisdiction the applicant is working, and the regular reinstatement fee of such L. L. must be paid.

Pense's dues fell in arrears for more than 3 months on December 1, 1953. Under date of December 7, 1953, the Union wrote a letter to the Com-

pany notifying it that Pense and another employee, by name of D. M. Ainsworth, "have not complied with said contract, as a Condition of Employment," and the "Union will await your compliance to the above subject set forth." The letter referred to, under the address, stated its subject to be "Union member in violation of Article XIV Section I, as a condition of employment." Presumably the foregoing letter was deemed not specific enough, for on December 17, 1953, the Union again wrote to the Company, this time as follows:

The International Association of Machinists Guided Missile Lodge #1254 is hereby notifying Consolidated Vultee Aircraft Corp., Pomona Division, co-signers of the present contract between the Union and the company, that former Union Members, D. M. Ainsworth, Department 25, Clock Number 10341 and C. E. Pense, Department 27, Clock Number 70053, are not in compliance with Article XIV of our Agreement in that they have been dropped from membership of our Association because of non-payment of dues in accordance with the Constitution and By-Laws of our Union.

We therefore, request the company to immediately terminate the above employees in accordance with the terms of our Agreement.

On January 7, 1954, Pense, still employed, went to David Provan, his successor as shop committeeman, and asked how much it would take to straighten up his dues. Provan figured that Pense owed \$17.50 for 5 months' dues, including Janu-

ary's. Pense gave Provan a check for the amount, but Provan said he was not sure that he could accept it. Provan asked how Pense came to get into this difficulty. Pense replied that he did not have the money. Provan expressed disbelief. The latter then telephoned John King, the Union's financial secretary, informed him that he had a check from Pense for dues and asked if he could accept it. King told Provan to return the check because Pense had already been dropped from membership and would have to apply for reinstatement. Later on the same day, Pense went to King at the Union's office, told him of his financial difficulties, procured an application for membership, filled it out by hand, and gave it to King. To the application form is attached a check-off authorization with a perforation between to facilitate separation. Pense tore off the check-off authorization before handing the application to King with a tender of his check for \$17.50. King took the application but refused to take the check.

Believing that the Union might react unfavorably to an application without a check-off authorization and believing also that he should offer an explanation of his previous revocation of his dues-deduction authorization, Pense, on January 11, 1954, wrote a letter to Ursino, the Union's business representative, explaining his financial difficulties and the incident of employees' copying the revocation of his authorization for dues deduction and requesting Ursino's help. He enclosed a new, typed application, this time with the dues deduction

authorization filled out,⁹ and requested that Ursino submit it to the members of the Union. This letter was delivered in due course of mail to the office of the Union for Ursino. The evidence is in dispute as to whether or not Ursino saw this letter before Pense's application was acted upon. Ursino testified that he did not receive the letter until after the membership meeting on January 14 when applications were passed on. He likewise testified that no application was enclosed with the letter. He testified that he did not mention receipt of Pense's letter until a few days after receiving it, when he commented to King that the letter which King had handed him the previous Thursday night, January 14, was a letter from Pense, that "There's quite a story involved in it * * * There isn't a thing I can do about it." But he did not, according to his testimony, give King the letter or application. However, the application which went before the membership on January 14 was the typed application which Pense testified he enclosed with his letter and not the one filled in by hand in King's presence. Contrary to Ursino's testimony, I find that the application was enclosed with Pense's letter and that in some manner it came into the possession of King before the January 14 meeting.

Applications for membership customarily go through the hands of a screening committee, which

⁹ According to Pense's testimony, which I credit on this, he dated the new application with the same date as his handwritten one, January 7.

make recommendations thereon. However, the applications of Ainsworth and Pense, then in possession of Financial Secretary King, were brought up at a meeting of the Union's executive board held an hour before the membership meeting on the evening of January 14. Before the executive board meeting, Ursino had arranged with John Hobb, president of the Union, for Ainsworth to appear in person before that board to plead his cause for readmission to the Union. After hearing Ainsworth, the committee voted to recommend his application. Hobb then asked the committee what action they wished to take on Pense, commenting on his conduct at the time of typing his letter revoking his dues deduction authorization. The committee voted to reject Pense's application. King attached their recommendations to the applications and took them, with a number of new applications, to the membership meeting. No member of the screening committee was present at the executive board meeting. No testimony was given to show whether or not the screening committee saw the applications before the membership meeting, but on the back of Pense's application appears the signature of the chairman of that committee, with the date January 14, 1954, under a recommendation that Pense's application be rejected. At the membership meeting that night, King read the applications and recommendations of the executive board to the members. Apparently no comment was made about any action of the screening committee. Business Representative Ursino, at his request, was given time to speak on be-

half of Ainsworth. A vote was then taken and carried to accept all applications except that of Pense. This was treated as a rejection of Pense's application.

On January 15, 1954, the Union wrote a letter to the Company, relating the action taken at the meeting the night before, canceling its request for discharge of Ainsworth, and repeating the request in its December 17 letter for the discharge of Pense. Although this letter stated that Pense's application for reinstatement was rejected, it did not state that Pense had tendered the requisite dues and initiation fee and that the Union had refused to accept them. The Company complied with the Union's request, discharging Pense on the same day, relying solely on the representations and request of the Union hereinabove described. Thereafter Pense unsuccessfully prosecuted a grievance¹⁰ and on February 1, 1954, filed the charges initiating these proceedings.

C. Concluding findings on Pense's discharge

In contending that the Company violated Section 8 (a) (3) of the Act, the General Counsel reasons that the invalid provisions of the union-security article of the contract invalidated the entire article

¹⁰ Ursino admitted that when Pense's grievance came to his attention he might have commented, "This is a good one. Here is a son of a bitch we get fired and now he wants us to represent him," although he did not think he used the words "son of a bitch." He confessed, however, to using the expression quite a bit.

so that the Company's discharge of Pense for non-membership in the Union at the latter's request would be without any contractual justification. With respect to the Union, the General Counsel makes not only this argument in support of his contention that the Union violated Section 8 (b) (2) (which would be a violation of the first alternative of that subsection) but he also contends that the Union violated Section 8 (b) (2) with respect to the second alternative stated in said subsection by terminating Pense's membership, or at least denying him reinstatement, because of his act of assisting other employees to cancel their dues deduction authorizations rather than his mere failure to pay dues. The latter contention, which will be first considered, is supported by the following facts:

Despite the provision of the constitution, previously quoted, that delinquency in dues for 3 months automatically terminated membership and that thereafter an application for reinstatement had to be made the Union, in at least three instances the Union accepted payment of back dues after 3 months' delinquency without first requiring the delinquent member formally to make application for reinstatement or to be voted on at a membership meeting. The three were not dropped from the rolls when, according to the constitution, they should have been. Clayton Wilson, one of the three, despite due notice of delinquency, owed October, November, and December, 1953, dues and was 3 months' delinquent on January 1, 1954. But on January 20, 1954, Wilson's tender of his October and Novem-

ber dues was accepted with no requirement that he make application for readmission. He left the unit on January 24, but in about May, 1954, he tendered his December and January dues to pay to the time he left the unit. The Union rejected them at this time on the ground that he had been dropped for nonpayment of December, January and February dues.¹¹

Nunzio Bitetti¹² was delinquent in his dues for September, October, and November, 1953, the same as Pense. On November 10, 1953, King, the financial secretary, sent him a notice that he would be 3 months delinquent at the end of that month, but Bitetti did not pay his dues before December 1 or even before January. On January 7, 1954, the same date that Pense tendered his delinquent dues, Bitetti paid 2 months' dues.¹³ The Union had among its records an application for reinstatement endorsed as approved by the screening committee. The purported date of this approval was December 24, 1953. But I find on the basis of the testimony of Financial Secretary King, that on January 11, 1954, he back-dated the endorsement, intending to insert the date of the last previous membership meeting, which would have been held on December

¹¹ The change in attitude might be accounted for by the fact that the charge against the Union had been filed in the interim.

¹² Bitetti's name is incorrectly spelled in the record as Bittetti.

¹³ The finding as to the date is based on a stipulation between the Union and the General Counsel.

24 if it had in fact been held on the fourth Thursday of the month as usual. However, the last previous meeting before January 11 was actually held on December 21. The minutes for that meeting do not show any action taken on any application for reinstatement by Bitetti. Bitetti's name was never removed from the roll of members as was Pense's. Union President Hobb testified that the Union had never had an application for reinstatement from anyone dropped by the Union before those of Pense and Ainsworth. The sum of the evidence leads me to the conclusion and I find that on January 11, 1954, after Bitetti had been allowed to pay his back dues, the Union, without vote of the membership, caused a membership application card to be made out and endorsed approved by the screening committee chairman in order to give a formally correct appearance to Bitetti's case and that Bitetti was not actually put through the same application procedure that Pense was.

A third man, William Goetz, failed to pay his dues after May 1953. He received delinquency notices on August 11, September 8, and September 28, 1953. On September 1, 1953, he was more than 3 months in arrears, but he was not dropped from the rolls. On September 15, 1953, he tendered, and the Union accepted, payment of 2 months' dues.¹⁴ King explained that Goetz' name was not removed

¹⁴ King sometimes gave a notice of 2 months' delinquency. Presumably the notice of September 28 was of that character as Goetz would not have been again 3 months in arrears until November 1.

from the rolls through an oversight by the Grand Lodge (parent organization) to whom names of members and last payment of dues are reported. But whether or not the Grand Lodge overlooked Goetz' delinquency, it is the duty of the financial secretary to note the name of a delinquent member for dropping as soon as he becomes 3 months in arrears. King might be excused for an error in his report to the Grand Lodge; but when he sent Goetz his delinquency notice on September 8, he admittedly knew that Goetz was already more than 3 months in arrears and should have been dropped. Nevertheless, on September 15, knowing this, King accepted from Goetz 2 months dues without requiring Goetz to make application for readmission as he did with Pense.

Pense and Ainsworth were the first delinquent members to be put in the position of having to make application for reinstatement and having their applications passed on by the executive board and the membership. And Pense was the first to be discharged for loss of membership. The mere fact that the Union had failed to comply with the constitution before the cases of Pense and Ainsworth arose, does not mean that it could not thereafter commence to comply with the constitution as it should have. But the fact that it commenced with Pense, against whom there appeared to be some ill feeling for reasons other than his failure to pay dues, and the fact that the constitutional provision was not uniformly applied thereafter, are circumstances not to be overlooked in determining the

true reason for the Union's dropping of Pense from membership.¹⁵ It is conceded that Pense's tender of \$17.50 was not rejected because of its form or amount. It is reasonably inferrible, and I find that, if Pense had not aggrieved the Union other than by becoming delinquent in dues, he would not have been dropped from the rolls. He was, I find, actually deprived of membership because of the circumstances surrounding his cancellation of his dues-deduction authorization. The Act does not authorize the Union to cause a discharge for such reason, so I find that the Union, by depriving Pense of his membership for such reason and by thereafter causing his discharge, violated Section 8 (b) (1) (A) and (2) of the Act.

But even granting, for the sake of argument, that Pense was dropped from membership solely for nonpayment of dues, he was, nevertheless, thereafter denied membership, on application, for a reason other than his failure to tender the dues and initiation fee uniformly required as a condition of acquiring membership. His application for reinstatement was accompanied by an authorization to deduct from his wages not only his dues but his initiation fee. No contention was made that this was inadequate as a tender. Ainsworth made the same

¹⁵ See Intermediate Report and Recommended Order in Biscuit and Cracker Workers Local Union No. 405, AFL, Case No. 2-CB-999, where a Trial Examiner found that disparate treatment deprived the respondent union of any justification for causing employee's discharge for nonpayment of dues.

kind of tender and his tender was accepted. If Pense's application had been accepted, he would have been charged the equivalent of 2 months' dues as a reinstatement fee, as was Ainsworth, and that amount, \$7.00, would have been paid under the check-off authorization tendered by Pense with his application, just as it was in the case of Ainsworth. No question is involved of the right of the Union to discipline its members, a right specifically protected by Section 8 (b) (1) (A) of the Act. If the Union felt that Pense's conduct in assisting union members to revoke their dues-deduction authorizations was inimical to its interests and deserving of penalty, it was free to inflict it. It was even free to withhold membership from Pense for such reason so long as it did not seek to cause his discharge by the Company for that reason. That it did in fact request his discharge for a reason other than his failure to pay his dues, or for a reason other than his failure to tender dues and initiation (or reinstatement) fee, is obvious from the fact that, but for the Union's displeasure caused by the conduct of Pense in aiding employees to revoke their dues deduction authorizations, his case was no different from that of Wilson, Goetz, and Bitetti, whose tender of dues more than 3 months' delinquent was not rejected, or from the case of Ainsworth, whose application for reinstatement, accompanied by a dues-deduction authorization was accepted. The Union sought to distinguish the difference in treatment between Ainsworth and Pense on the ground that Ainsworth appeared personally before the ex-

ecutive board and pleaded his case, while Pense did not. No Union rule, by-laws, or constitutional provision required appearance before the executive board in such case. In fact there was nothing in such rules providing for consideration of applications by the executive board at all, and there was no precedent for it. Pense could not have been expected to know that his case would be passed on by the executive board, much less that he would be expected to appear before it. Had not the business agent taken Ainsworth under his wing and steered him to the executive board, Ainsworth would not have appeared there either. I am not persuaded that the disparate treatment afforded the two men resulted from such a tenuous and illogical distinction. Rather I find that the real reason for rejection of Pense's application (just the same as the rejection of his tender of dues) was the Union's displeasure with his conduct as explained above and was not, in any event, a failure to tender the requisite dues or initiation fee. Had Pense already been discharged at the time he made his application for reinstatement in the Union, the rejection thereof could not have affected his employment status. It does not appear why the Union, after demanding the immediate discharge of Ainsworth and Pense on December 17, 1953, stood silent for nearly 30 days before again insisting on giving the contract effect. No contention is made that the Company wilfully disregarded its agreement. I note the fact that it acted quite promptly on receipt of the Union's letter of January 15, 1954. I can only

infer that the delay was acquiesced in by the Union for some reason, perhaps to give Ainsworth and Pense an opportunity to make application for reinstatement and have it passed on. In any event, Pense had not yet lost his employment before either of the tenders made as hereinbefore related. Inasmuch as the Union, by its letter of January 15, 1954, cause the Company to discharge Pense and inasmuch as the reason of the Union for causing such discharge was not Pense's failure to tender the requisite dues and initiation fee, the Union caused the Company to discriminate against Pense in violation of Section 8 (b) (2) of the Act.

Because the Company had no reason to believe that Pense had been dropped from membership or denied reinstatement for any reason other than failure to pay dues, as the Union represented the case to be, the Union's true motive did not enter into the Company's action of discharging Pense. Therefore, although Pense was in fact discriminated against, the Act permits the Company to justify (or excuse) the discharge so as to relieve it of the consequences of the discrimination. This no doubt explains the omission, in the complaint, of an allegation that the Company violated Section 8 (a) (3) as a result of the Union's improper motive.

On the other hand, the complaint alleges that both the Company and the Union committed unfair labor practices as a result of their conduct with respect to Pense because of the illegality of the union-security

provision. In making this contention, the General Counsel adopts the premise that any illegality in terms of a union-security clause renders the entire provision void. If this premise is correct, not only the Union but the Company likewise is guilty of an unfair labor practice in the discrimination against Pense, for the justification by the Company for Pense's discharge depends on the existence of a union-security agreement which requires the payment of dues and initiation fees as a condition of employment. If the entire union-security section of the contract is void for illegality, the Company's justification is gone, even if it did not discharge Pense pursuant to the illegal language—that is, did not discharge him for failing to pay dues after having left the unit while a union member and later being re-employed in the unit at a time when he was not a member. When the Act uses the word "agreement" in the proviso, "That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *" it does not furnish any definition for the word. It could mean one entire writing, called an agreement, whether or not each item therein is violative of the purpose of the Act; or it could mean just the individual item of agreement among many dealing with union security; or it could mean all items of that portion of an entire contract which deals with the

subject of union security even though less than all are contrary to the purpose of the Act. It has been decided that it does not have the first meaning. An entire contract is not a nullity because of an illegal union security provision.¹⁶ So far as I am aware, it has not yet been decided that illegality in one aspect of a union security contract does not void the entire union security section. The Act does not specifically require the nullification of the whole union-security agreement because one portion of it may be unauthorized. The proviso quoted above is negative—that nothing shall preclude the making of a union-security agreement—rather than that all parts of an agreement attempting to establish union security are void. The license for finding such agreement void derives from the principle that a purpose to circumscribe the rights and protection intended to be provided for employees by the Act is contrary to the policy of the law. But calling one portion of a contract illegal is not tantamount to saying that the whole is void. As used in connection with contracts, the word “illegal” may have different meanings, depending on how far it may be necessary to go to effect the policy of the law. Severability in terms of a contract may contribute to a determination of the extent to which a contract will be outlawed. Severability is generally found to exist if the illegality is in a promise or condition which does not constitute

¹⁶ *N. L. R. B. v. Rockaway News Supply Company, Inc.*, 345 U. S. 71; *Golden Valley Electrical Association, Inc.*, 109 NLRB No. 62.

the main or essential feature or purpose of the agreement, where deletion of the unlawful part will not distort the meaning and intent of the parties as to the balance, and where the illegality is not so interwoven with the remaining portion as to taint it with illegality, too.¹⁷ It may be that, to the extent that an employee who was a member of the Union on leaving the unit is still a member of the same parent organization on being re-employed in the unit, albeit through a different local, a requirement of membership or payment of dues on re-employment in the unit may be lawful without a grace period. But the agreement itself does not differentiate between such employees and others who are not members on re-employment. As to the latter, the language of the agreement is unlawful. No words can be deleted which will permit application so far as legal. Therefore, the whole phrase is void. But this does not necessarily mean that the entire maintenance of membership article must be found to be void. Again applying the test of severability, I note that the unlawful language is subsidiary to the main purpose of Article XIV, it is severable in its own terms, that is, it is possible to delete the offensive language without rendering the remainder of the maintenance-of-membership agreement unperformable, and it does not, in my opinion, taint the balance with its illegality so that the remaining maintenance-of-

¹⁷ See American Law Institute Restatement of Contracts, Vol. 2, § 603; annotations: 6 L.R.A. (N.S.) 547; 26 L.R.A. (N.S.) 106.

membership provisions must be nullified.¹⁸ Accordingly, I find that, although the provision for mandatory payment of dues by employees when re-employed in the unit, if they had been members on leaving it, is illegal and void, it does not so pervade the balance of the maintenance-of-membership agreement as to taint it and render it a nullity. Because Pense was not discharged pursuant to the severable illegal provisions of the maintenance-of-membership agreement, the respondents are not deprived of any justification for their conduct in connection with his discharge that they otherwise would have. However, even under a valid union-security agreement, the Union's conduct here would not have been justified; so it is not relieved from the consequences of its unfair labor practice by the fact that the illegality is severable and did not contribute to the discrimination against Pense.

Although I have found that the inclusion of the

¹⁸ In this respect, I find the case here distinguishable from *Pacific Intermountain Express Co.*, 107 NLRB No. 158; *Local 803; International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America (AFL) et al.*, 107 NLRB No. 212; and *Tacoma Harbor Lumber & Timber Company*, 108 NLRB No. 127. In these cases, the illegality pervaded the entire union security plan. In the last cited case, for example, the agreement was for a modified union shop which did not give new employees the full 30 days in which to join the union. The principal purpose of a union shop cannot be achieved unless new employees join the union. The illegal portion of that contract, therefore, could not be considered subsidiary to the main purpose of the clause.

requirement of payment of general assessments in the contract was not by itself an unfair labor practice, there is no doubt that the language was unauthorized by the Act. In the representation cases previously cited, the Board held such language to be illegal. The question of severability was not raised. It may be argued that, in holding such contract no bar to an election, the Board, in effect, was holding that the entire contract was a nullity. But that is not necessarily true. The Board has recently held in an unfair labor practice case, that illegality of a contract in one respect does not warrant an order to cease and desist giving effect to the entire contract.¹⁹ As previously stated, the extent to which illegality will be found to void a contract depends to some extent on how far it may be necessary to go to give effect to the policy of the law. The Board may, in its discretion, decide that, in representation cases, the policy of the law can best be effectuated by holding that a contract in which a union attempts to gain any unauthorized advantage will constitute no bar to an election. In an unfair labor practice case, it may be necessary to do no more than to require that the unauthorized language be deleted. This would be true if the illegal language were severable. Where no moral turpitude is involved and where the statute does not expressly state that the use of unauthorized language will nullify the contract, the policy of the law may be effectuated adequately by requiring the parties to eliminate the offending lan-

¹⁹ Golden Valley Electric Association, Inc., 109 NLRB No. 62.

guage so as to guard against even the possibility of a future unfair labor practice. The Union explains that the unwarranted word "assessments" got into the agreement because it was in a check-off provision in former contracts which did not contain any union-security provision, and, when the maintenance-of-membership contract was made, it was incorporated therein without noticing the need for a change. If this be true, it was a matter of inadvertence rather than design to violate the policies of the Act, no one actually suffered as a consequence of the inadvertence, and the Union gained no preferred position as a result thereof. Whatever remedy might be deemed essential to cope with intended illegality, voiding the entire union security provision seems unnecessary here where apparently it was not inserted by design and where no performance had taken place under it. Under the Union's constitution, assessments are not treated as dues, being separately payable. Under the contract there is no confusion between dues and assessments, both apparently being payable independently. So the unauthorized word or words may be stricken without affecting performance of the remaining provisions; and the requirement of payment of general assessments is subsidiary to the main purpose of the Union's security clause, so it does not taint the remaining legal language. Consequently, I find the provision for payment of general assessments in the contract is severable, and that, although it is void it does not affect the remaining parts of the agreement found not to be illegal.

IV. The effect of the unfair labor practices upon commerce

The activities of the respondents set forth in Section III, above, occurring in connection with the operations of the Company described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the respondents have engaged in certain unfair labor practices, I shall recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As stated above, in a new collective bargaining contract between the Union and the Company effective February 1, 1954, the requirement of payment of general assessments as a condition of employment was omitted from the union security section, which otherwise remained the same. I see no reason to anticipate any danger that the omitted words will hereafter be reinserted in the same or a similar agreement. Therefore, no cease and desist order seems to be required as to such language.

No question has been raised concerning the propriety of recommending that the remedy extend to General Dynamics Corporation, successor of the original respondent, but in view of the Board's decision in *Symns Grocery Co.*, 109 NLRB No. 58, it will be well to differentiate this case. It is unneces-

sary to decide whether a distinction should be drawn between an assignee, as in that case, where there was a severance of the business sold from that retained by the respondent, and a successor, as in this, where the respondent merges in a new corporation and continues as a division of the successor corporation, because here the successor, General Dynamics Corporation expressly assumed all of the obligations of Consolidated Vultee Aircraft Corporation. This would include the collective bargaining agreement made on February 1, 1954. The new agreement continued in effect a portion of the illegal language of the prior agreement as heretofore found. Hence, to that extent, the successor, General Dynamics Corporation, will merely be remedying its own unfair labor practice. Furthermore, General Dynamics Corporation, by its own motion to be substituted as respondent in place of Consolidated Vultee Aircraft Corporation, acquiesced in the issuance of any remedial order against itself.

Since it has been found that the Union caused the Company discriminatorily to discharge Pense for reasons other than his failure to tender the requisite dues and initiation fees in violation of the Act, I shall recommend that the Union notify the Company and Pense that it withdraws any and all objections it may have to the reinstatement of Pense with his previous seniority and other rights and privileges, and that it will not again request his discharge for a reason other than his failure to tender the requisite dues and initiation fees (including reinstatement fees). I will further recommend that the Union

make Pense whole for any loss he may have suffered as a result of the discrimination caused by the Union by paying to him a sum of money equal to that which he would have earned in his employ with the Company but for the discrimination against him, from January 15, 1954, to 5 days after the receipt of notification by the Company and Pense that it has withdrawn its objection to his reinstatement as aforesaid, less his net earnings elsewhere, if any, during that period.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

2. By maintaining in effect, a union-security provision in a contract requiring that employees who, on leaving the bargaining unit were members of the Union, should, on re-employment in the unit, again pay dues, whether or not they are then members of the Union, and without providing the statutory period of 30 days in which to become members as a condition of employment,

(a) the Company has engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of the Act;

(b) the Union has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act.

3. By causing the Company to discharge Pense

discriminatorily within the meaning of Section 8 (a) (3) of the Act, the Union has engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, I recommend that:

I. The respondent, General Dynamics Corporation, Convair Division (Pomona), its officers, agents, and successors, shall:

A. Cease and desist from:

(1) Entering into, continuing in force, or giving effect to, any union-security provision of a collective bargaining agreement with the Union or with any other labor organization of its employees which requires membership in the Union or in any other labor organization or payment of union dues by nonmembers as a condition of employment within 30 days of their employment in the bargaining unit.

(2) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

B. Take the following affirmative action which I find will effectuate the policies of the Act:

(1) Post in conspicuous places at its place of business in Pomona, California, in all locations where notices to employees are customarily posted, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region (Los Angeles, California) after being duly signed by the Respondent Company's duly authorized representative, shall be posted immediately upon receipt thereof and shall be maintained by it for a period of 60 consecutive days. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(2) Notify the said Regional Director in writing within 20 days from the date of service of this Intermediate Report and Recommended Order of what steps the Company has taken to comply herewith.

II. The respondent, International Association of Machinists, Guided Missile Lodge 1254, shall:

A. Cease and desist from:

(1) Entering into, continuing in force, or giving effect to, any union-security provision of a collective bargaining agreement with the Company or its successors or assigns which requires membership in the Union or payment of union dues by nonmembers as a condition of employment within 30 days of employment in the collective bargaining unit.

(2) Causing or attempting to cause the Company, its officers, agents, successors, or assigns, contrary to the provisions of Section 8 (a) (3) of the Act, to discriminate in regard to hire or tenure of employ-

ment or any term or condition of employment of Charles E. Pense or of any other employee, except to the extent that membership in a labor organization may be required as a condition of employment as authorized in Section 8 (a) (3) of the Act.

(3) In any other manner restraining or coercing employees in the exercise of their right to engage in, or to refrain from engaging in, concerted activities as guaranteed in Section 7 of the Act, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

B. Take the following affirmative action which I find will effectuate the policies of the Act:

(1) Notify the Company and Charles E. Pense that it withdraws any and all objections it may have to the reinstatement of Pense to his former or substantially equivalent position with his previous seniority and other rights and privileges and that it will not again request the discharge of said Pense or any other employee for a reason other than failure to tender the monthly dues or initiation fee (including reinstatement fee) uniformly required to acquire or maintain membership in the Union as a condition of employment under an agreement authorized by Section 8 (a) (3) of the Act.

(2) Make Charles E. Pense whole for any loss he may have suffered as a result of the discrimination caused by the Union by paying him a sum of money equal to that which he would have earned in his em-

ploy with the Company but for the discrimination against him between January 15, 1954 (the date of the discrimination) and a date 5 days after receipt by the Company or by Pense, whichever is later, of the notification required in the next preceding paragraph, less his net earnings²⁰ elsewhere during said period, such loss to be computed on a quarterly basis in accordance with the Board's established practice.²¹

(3) Post at its meeting place in Pomona, California, copies of the notice attached hereto and marked "Appendix B." Copies of such notice, to be furnished by the Regional Director for the Twenty-first Region (Los Angeles, California), after being duly signed by an authorized representative of the Union, shall be posted by it immediately upon receipt thereof and shall be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that such notices are not altered, defaced, or covered by any other material.

(4) Notify the said Regional Director in writing within 20 days from the date of service of this Intermediate Report and Recommended Order of what steps the Union has taken to comply herewith.

It is further recommended that, unless on or be-

²⁰ *Crossett Lumber Company*, 8 NLRB 440; *Minneapolis Star and Tribune Company*, 109 NLRB No. 109.

²¹ *F. W. Woolworth Company*, 90 NLRB 289.

fore 20 days from the date of service of this Intermediate Report and Recommended Order, the respective respondents shall notify said Regional Director in writing that they will comply with the foregoing respective recommendations, the National Labor Relations Board issue an order requiring the noncomplying respondent or respondents to take the action aforesaid.

Dated this 23rd day of August, 1954.

/s/ JAMES R. HEMINGWAY,
Trial Examiner

APPENDIX A

Notice To All Employees: Pursuant to the recommendations of a trial examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not enter into, continue in force, or give effect to, any union-security provision of a collective bargaining agreement with International Association of Machinists, Guided Missile Lodge 1254, or with any other labor organization of our employees, which requires employees to become members of said Union or any other labor organization, or which requires nonmembers to pay dues, as a condition of employment within 30 days of their employment in the bargaining unit.

We Will Not in any like or related manner interfere with, restrain, or coerce employees in the exer-

APPENDIX B

Notice to All Members of International Association of Machinists, Guided Missile Lodge 1254: Pursuant to the recommendations of a trial examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not enter into, continue in force, or give effect to, any union-security provision of a collective bargaining agreement with General Dynamics Corporation, Convair Division (Pomona), its successor or assigns, which requires membership in this Union, or payment of dues by nonmembers, as a condition of employment within 30 days from the date of employment in the collective bargaining unit.

We Will Not cause or attempt to cause the above-named corporation, its officers, agents, successors or assigns, contrary to the provisions of Section 8 (a) (3) of the Act, to discriminate in regard to hire or tenure of employment or any term or condition of employment of Charles E. Pense or of any other employee.

We Will Not in any other manner restrain or coerce employees in the exercise of their right to self-organization, to form labor organizations, to join or assist this Union or any other labor organization to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or

all such activities except to the extent that such right may be affected by an agreement requiring membership in this Union as a condition of employment as authorized in Section 8 (a) (3) of the Act.

We Will Notify the above-named corporation and Charles E. Pense that we withdraw all objections to his reinstatement to his former or substantially equivalent position with his previous seniority and other rights and privileges and that we will not again request the discharge of said Pense or any other employee for a reason other than failure to tender the dues and initiation fee (including reinstatement fee) uniformly required to acquire or maintain membership in this Union as a condition of employment under an agreement authorized by Section 8 (a) (3) of the Act.

We will make whole said Charles E. Pense for any loss suffered by him as a result of the discrimination caused against him.

International Association of Machinists,
Guided Missile Lodge 1254

Dated.....

By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service by Mail and Postal Return Receipts Attached.

[Title of Board and Cause.]

RESPONDENT UNION'S EXCEPTIONS TO INTERMEDIATE REPORT

International Association of Machinists, Guided Missile Lodge 1254, the Respondent Union submits its exceptions to the findings of fact, conclusions, and reasons or basis therefor contained in the Intermediate Report and Recommended Order issued under date of August 23, 1954.

Exceptions

No. 1, Page 2, Lines 34-39: To the conclusion and inference that the Company refused to reinstate Pense because the Union persisted in its demand that the Company refuse to re-employ Pense.

No. 2, Page 6, Lines 43-47: To unwarranted, irrelevant, and immaterial speculation as to what the parties contemplated.

No. 3, Page 6, Lines 47-48: To the conclusion and finding that the language is broad enough to cover a number of other situations.

No. 4, Page 6, Line 48, to Page 7, Line 10: To the examples cited of situations inconsistent with the clear language of the Agreement between the parties.

No. 5, Page 6, Line 48, to Page 7, Line 10: To the conclusion and finding that a member under the circumstances cited could terminate his membership irregardless of the provisions in the Agreement and

to the inference that such termination would take precedence over his contractual obligations.

No. 6, Page 7, Lines 13-17: To the speculation, conjecture, and assumption of what might happen under another contract in effect elsewhere.

No. 7, Page 7, Lines 19-25: To the irrelevant, immaterial speculative conclusion and finding of what might happen under an imaginery set of circumstances unrelated to this employer, this union, and this contract.

No. 8, Page 7, Lines 26-31: To the conclusion and finding that an employee who leaves the company, who ceases to be a union member, and who then returns to employment during the life of the same contract is in the same relative position as any new employee who is not a member of the union.

No. 9, Page 7, Lines 33-43: To the conclusions about the construction of the contract.

No. 10, Page 7, Lines 33-43: To the finding that Section 3 of Article XIV does not conform to the requirements of Section 8 (a) (3) of the Act.

No. 11, Page 7, Lines 43-48: To the conclusion and finding that "it cannot be determined that they joined the Union voluntarily."

No. 12, Page 7, Lines 43-48: To the finding that the language of Sec. 3 of Article XIV tends to "compel membership" without distinction from the clear and obvious "maintenance of membership" which is legally permissible.

No. 13, Page 7, Lines 43-48: To the apparent confusion extant in the mind of the Trial Examiner over the various kinds of transfers involved in this

case, and his failure to clearly define what transfers he was talking about nor did he distinguish between the several kinds of transfers.

No. 14, Page 7, Lines 48-52: To the conclusion and finding that the provisions of Section 3 of Article XIV violates the Act because it coerces employees into doing that which under Section 7 of the Act they have a right to refrain from doing.

No. 15, Page 7, Lines 52-59: To the finding that the Company discriminated in regard to hire and tenure of employment in violation of Section 8 (a) (3) of the Act.

No. 16, Page 7, Lines 52-59: To the finding that the Union caused such discrimination in violation of Section 8 (b) (2).

No. 17, Page 7, Lines 52-59: To the finding that the Company violated Section 8 (a) (1) of the Act because of the prior finding that it had violated Section 8 (a) (3).

No. 18, Page 7, Lines 52-59: To the finding that the Union violated Section 8 (b) (1) (A) of the Act because of the prior finding that it had violated Section 8 (b) (2).

No. 19, Page 8, Lines 8-12: To the inference, conclusion, and finding that Pense ceased being a committeeman because he ceased paying his dues.

No. 20, Page 8, Line 53, to Page 9, Line 3: To the conclusion and finding that the Union was displeased with Pense's action.

No. 21, Page 8, Line 53, to Page 9, Line 3: To the conclusion and finding that members in Pense's de-

partment undertook to replace Pense because the Union was displeased with Pense's action.

No. 22, Page 8, Line 53, to Page 9, Line 3: To the inference, conclusion, and finding that "quite a number" of members believed that they were withdrawing from the Union instead of just cancelling their dues deduction authorization.

No. 23, Page 8, Line 53, to Page 9, Line 3: To the inference, conclusion, and finding that members in Pense's department sought to replace him because "quite a number of members" thought they were withdrawing from the union instead of just stopping dues deductions.

No. 24, Page 8, Line 53, to Page 9, Line 3: To any and all inferences, conclusions, or findings that the Union knew of the actions of Pense, recited in Lines 45-49, Page 8, prior to the actual testimony other than the fact that Pense had submitted a letter stopping his dues deductions.

No. 25, Page 8, Line 53, to Page 9, Line 3: To any inference, conclusion, or finding that the members in Pense's department sought to replace him because another union was seeking to establish a unit in the plant.

No. 26, Page 8, Line 53, to Page 9, Line 3: To the inference, conclusion, and finding that the Union was displeased with Pense because another union was seeking to establish a unit in the plant.

No. 27, Page 9, Lines 3-5: To the inference, conclusion, and finding that Hobb heard rumors about Pense's actions as set forth in Lines 45-49, Page 8, when in fact Hobb only heard about the letter Pense

submitted in his own behalf and knew of no other activity whatsoever involving Pense.

No. 28, Page 9, Line 60: To the finding that Pense tore off the check-off authorization before handing the application to King.

No. 29, Page 10, Lines 1-3: To the conclusion that Pense believed the Union might react unfavorably.

No. 30, Page 10, Lines 7-8: To the conclusion and finding that a new typed application card was submitted to Ursino in a letter.

No. 31, Page 10, Lines 23-27: To the finding that the application card submitted to Ursino was the application card acted upon by the Local Lodge.

No. 32, Page 10, Lines 36-38: To the finding that Hobb told the Executive Board about Pense's actions in typing his letter revoking his dues deduction authorization.

No. 33, Page 11, Lines 2-5: To the inference that the Union was obligated to tell the Company that Pense had tendered dues or initiation fees.

No. 34, Page 11, Lines 2-5: To the inference that Pense made a timely offer of the dues required to maintain his membership or his employment.

No. 35, Page 12, Lines 47-52: To the conclusion, inference, and finding that there appeared to be some ill feelings against Pense for reasons other than his failure to pay dues.

No. 36, Page 12, Lines 47-52: To the conclusion that lack of uniform application of the Constitution is related to the "true reason" for dropping Pense from membership.

No. 37, Page 13, Lines 2-4: To the inference and the finding that Pense had aggrieved the Union.

No. 38, Page 13, Lines 2-4: To the inference and finding that the Union dropped Pense from the rolls because it was aggrieved.

No. 39, Page 13, Lines 4-6: To the finding that Pense was actually deprived of membership because of the circumstances surrounding his cancellation of his dues deduction authorization.

No. 40, Page 13, Lines 6-9: To the finding that the Union caused Pense's discharge because of the circumstances surrounding his cancellation of his dues deduction authorization.

No. 41, Page 13, Lines 6-9: To the finding that the Union violated Section 8 (b) (1) (A) and Section 8 (b) (2) of the Act.

No. 42, Page 13, Lines 11-15: To the conclusion and finding that Pense was denied membership for a reason other than his failure to tender the dues and initiation fee uniformly required as a condition of acquiring membership.

No. 43, Page 13, Lines 30-48: To the finding that it was obvious that the Union in fact requested his discharge for a reason other than his failure to pay his dues because of the Union's displeasure at Pense for aiding employees to revoke their dues deductions.

No. 43A, Page 13, Lines 30-48: To the finding that Pense's case was no different from that of Wilson, Goetz, and Bitetti except for the Union's displeasure at Pense.

No. 44, Page 13, Lines 48-50: To the finding and conclusion that the Business Agent (Ursino) had taken Ainsworth under his wing.

No. 45, Page 13, Lines 48-50: To the finding and conclusion that Ainsworth would not have appeared before the Executive Board if the Business Agent (Ursino) had not taken him under his wing and steered Ainsworth.

No. 46, Page 13, Lines 50-55: To the finding that the real reason for rejection of Pense's application was the Union's displeasure with his conduct and not in any event either his failure to tender the required dues or an initiation fee.

No. 47, Page 13, Lines 57-61: To the observation that the Union stood silent for nearly 30 days before again insisting on giving the contract effect, and the implied inference that some sinister motive caused the Union not to explain the passage of time.

No. 48, Page 14, Lines 2-5: To the inference, conclusion, or finding that the delay was acquiesced in by the Union for some reason.

No. 49, Page 14, Lines 7-12: To the finding that the Union caused the discharge of Pense for reasons other than Pense's failure to tender the dues and initiation fee.

No. 50, Page 14, Lines 7-12: To the finding that the Union caused the Company to discriminate against Pense and thereby violated Section 8 (b) (2) of the Act.

No. 51, Page 15, Lines 16-24: To the finding that a whole phrase is void (Section 3 of Article XIV).

No. 52, Page 15, Lines 33-37: To the finding that the provision for mandatory payment of dues by employees when re-employed in the unit is illegal and void even though they had been members when leaving the unit.

No. 53, Page 17, Lines 34-42: To the recommendation that the Union withdraw any and all objections it may have to the reinstatement of Pense with restoration of his previous seniority and other rights and privileges.

No. 54, Page 17, Lines 42-49: To the recommendation that the Union make Pense whole.

No. 55, Page 17, Line 60, to Page 18, Line 12: To the second conclusion of law in its entirety.

No. 56, Page 18, Lines 14-17: To the third conclusion of law in its entirety.

No. 57, Page 18, Line 23, Page 19, entire page, to Page 20, Line 16: To the recommendations in their entirety because of each and all of the exceptions noted hereinbefore.

Los Angeles, California, October 1, 1954.

Respectfully submitted,

/s/ A. C. McGRAW,

Grand Lodge Representative, International Association of Machinists, For Itself and in Behalf of its Subordinate Local Lodge No. 1254.

United States of America

Before the National Labor Relations Board

Case No. 21-CA-1911

CONVAIR, A DIVISION OF GENERAL DYNAMICS CORPORATION

and

CHARLES E. PENSE, An Individual

Case No. 21-CB-561

INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED MISSILE LODGE 1254

and

CHARLES E. PENSE, An Individual

DECISION AND ORDER

On August 23, 1954, Trial Examiner James R. Hemingway issued this Intermediate Report in the above-entitled proceeding, finding that the Respondents¹ had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirma-

¹ At the suggestion of Convair, a Division of General Dynamics Corporation, the complaint was amended at the hearing to substitute it as the Respondent Company herein in place of Consolidated Vultee Corporation, Pomona Division, the Respondent Company originally named in the complaint.

tive action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not engaged in certain other unfair labor practices alleged in the complaint. Thereafter, the Respondent Union and the General Counsel filed exceptions to the Intermediate Report and supporting briefs. The Respondent Union's request for oral argument is hereby denied as the record, the exceptions and briefs, in our opinion, adequately present the issues and the positions of the parties.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the exceptions, modifications, and additions noted below.

1. The Trial Examiner found that the Respondent Company violated Section 8 (a) (3) and (1) of the Act, and the Respondent Union violated Section 8 (b) (2) and (1) (A) of the Act, by maintaining certain illegal provisions in the union-security section of the contract to which they were parties during the period covered by the complaint. He also found that the Respondents did not violate the Act because of certain other union security provisions in the contract in question.

We agree with the Intermediate Report in the

instant connection to the extent that it finds that the Respondents violated the Act in the manner found by the Trial Examiner. The union-security provisions of the contract relied upon here, which is the maintenance-of-membership variety, are fully set forth in the Intermediate Report.² In brief, they require an employee who is separated from the bargaining unit covered by the contract, at a time when he is a member of the Respondent Union, to resume paying membership dues immediately upon his reemployment within the bargaining unit. Thus, an employee who quits his employment or is transferred from the bargaining unit while a member of the Respondent Union must, as a condition of reemployment in any capacity within the unit, resume paying union dues even though he has resigned his union membership in the meantime, a period during which he could not, as an employee outside the bargaining unit covered by the contract, legally have been required by the contract to maintain his union membership. We share the Trial Examiner's opinion that for purposes of this case such an employee, upon the occasion of his reemployment, stands in the same shoes as one being hired by the Respondent Company for the first time, who has never been a member of the Respondent Union, and that the existence of a contractual obligation upon an employee in that position to pay union dues beginning with the commencement of his employment

² The contract provided, *inter alia*, for withdrawal from the Respondent Union between August 1 and August 15 of the currently effective yearly period.

would be plainly violative of the Act. While the evidence does not indicate whether the Respondents enforced the provisions in question in an unlawful manner, the Respondent Union concedes in its brief that "In all situations except a quit, when, as, and if a person returned to the unit, he was obligated to resume the payment of dues * * *"³ It is also significant that the provisions in question were continued in a new agreement executed by the Respondent in February 1954. On the basis of the foregoing, and the entire record, we find, as the Trial Examiner did, that by maintaining in existence the unlawful provisions in question during the critical period herein, the Respondent Company violated Section 8 (a) (1) and (3) of the Act, and the Respondent Union violated Section 8 (b) (1) (A) and (2) of the Act.⁴

Contrary to the Trial Examiner, we find that the Respondents also violated the Act by maintaining

³ Member Murdock, were it not for the apparent agreement of Respondent's representative, would seriously question the construction of the Trial Examiner of the contractual provision in question.

⁴ *Permanente Steamship Corporation*, 107 NLRB No. 234; *Ebasco Services Incorporated*, 107 NLRB No. 143. That "quits" alone may have in fact, been treated as "brand new employees" by the Respondents, when rehired within the bargaining unit, as the Respondent Union asserts in its brief, is immaterial in view of all the above. We accordingly deem it unnecessary to reopen the record for the purpose of receiving testimony on that matter, as requested by the Respondent Union.

in their contract the union-security provision requiring the payment of general union assessments, in addition to initiation fees and monthly union dues, as a condition of employment.⁵ Such a contractual provision, threatening, as it does, loss of employment to any employee who fails to pay union assessments, goes beyond the permissive language of Section 8 (a) (3) of the Act and has been held to act as restraint upon employees desiring to refrain from union activities within the meaning of Section 7 of the Act.⁶ Accordingly, it follows that by retaining that provision in their contract the Respondent Company thereby violated Section 8 (a) (1) of the Act and the Respondent Union thereby violated Section 8 (b) (1) (A) of the Act. However, because the record shows that the Respondents did not attempt to enforce the unlawful provision, and fails to establish that they intended

⁵ The Trial Examiner, while finding this provision to be void and illegal, concluded that it did not serve as the basis for an unfair labor practice finding.

⁶ See *National Malleable and Steel Castings Company*, 99 NLRB 737; *The Great Atlantic & Pacific Tea Company (Pittsburgh Bakers)* 110 NLRB No. 146; *Amalgamated Local 286, International Union, United Automobile Workers of America, AFL*, 110 NLRB No. 53. In so finding we reject the waiver theory applied by the Trial Examiner in the Respondent's favor. The provisions in the Act which guarantee employees certain rights, and outlaw the restraint of employees in the exercise of those rights by employers and unions, are not subject to the qualification which the Trial Examiner would read into the Act.

to utilize it during the critical period herein,⁷ we do not find that the Respondents' conduct in this regard otherwise violated the Act, as alleged in the complaint.⁸

2. For the reasons set forth in the Intermediate Report, the Trial Examiner found that the Respondent Union, in causing Charles E. Pense's discharge on January 15, 1954, violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act, but that the Respondent Company, in discharging Pense at the Respondent Union's request, did not violate the Act.

The Respondent Union contends that it requested Pense's discharge, pursuant to the union-security section of its contract with the Respondent Company, because of Pense's dues delinquency, and the Respondent Company asserts that it discharged Pense, pursuant to the aforementioned contract, at the Respondent Union's request and upon its representation that Pense was delinquent in his dues. Even were we to accept as true the reasons offered by the Respondents for their conduct vis-a-vis Pense, it is plain, as the complaint alleges, that the action by each of them must be held violative of the Act, unless it was protected by a valid union-security clause. It is therefore necessary to inquire into the validity of the Trial Examiner's finding, to which the General Counsel has excepted, that a

⁷ The 1954 contract between the Respondents does not require the payment of assessments as a condition of employment.

⁸ Jandel Furs, 100 NLRB 1390.

valid union-security clause providing for the payment of union dues as a condition of employment was in effect at the time of Pense's discharge.⁹

As already noted, there are provisions in the union-security section of the relevant contract which exceed the limited form of union-security permitted by Section 8 (a) (3) of the Act. In the Trial Examiner's opinion, however, those provisions are severable from, and do not taint, the requirement in the same section for the payment of initiation fees and monthly dues as a condition of employment, thus leaving that portion of the union-security section of the contract available as a defense to a discharge for nonpayment of dues. We are unable to accept this view of the contract by the Trial Examiner. All the provisions in question are related in character and are integral parts of the union-security arrangement devised by the Respondents. Viewing the union-security section of the contract as a whole, we find that the lawful

⁹ In view of this holding, the Trial Examiner found it necessary to decide whether Pense's nonpayment of dues entered into the Respondent Union's request for his discharge and concluded, as in effect alleged in the complaint, that it did not. The Trial Examiner accordingly found that the Respondent Union violated the Act as noted above. As for the Respondent Company, the complaint alleges only that it violated the Act by discharging Pense at the Respondent Union's request at a time when no valid union-security provision was in effect justifying such conduct.

requirements therein¹⁰ are so interwoven with the unlawful ones as to be tainted with illegality themselves. For this reason, we find that no valid union-security clause is available as a defense to the discharge of Pense.¹¹

Accordingly, we find that the Respondent Company discriminatorily discharged Pense in violation of Section 8 (a) (3) and 8 (a) (1) of the Act, and that the Respondent Union caused Pense's discharge in violation of Section 8 (b) (2) and 8 (b) (1) (A) of the Act.¹²

The Remedy

Having found that the Respondents engaged in the unfair labor practices set forth above, we shall order that they cease and desist therefrom and that they take certain affirmative action designed to effectuate the policies of the Act.

¹⁰ The requirement for the payment of initiation fees and monthly dues is, of course, a valid one when considered in isolation.

¹¹ Local 803, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL, 107 NLRB No. 212. See also such cases as John Deere Planter Works of Deere & Company, 107 NLRB No. 306, and International Harvester Company, 95 NLRB 730, wherein the Board held union-security clauses, otherwise valid, to be illegal because they required the payment of general union assessments as a condition of employment.

¹² In view of our disposition of this aspect of the case, we deem it unnecessary to pass upon the validity of the Trial Examiner's pretext finding.

1. We have found that the Respondent Company discriminated against Charles E. Pense and that the Respondent Union caused such discrimination. We shall order that the Respondent Company offer Pense immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges.¹³ With the exception noted hereinafter, we shall also order that the Respondent Company and the Respondent Union jointly and severally make Pense whole for any loss of pay suffered as a result of the discrimination practiced against him. Because the Trial Examiner did not find that the Respondent Company discriminated against Pense, we shall not hold the Respondent Company accountable for any back pay which accrued during the period between the issuance of the Intermediate Report and our Decision and Order. In the circumstances, we believe that the policies of the Act will best be effectuated by ordering the Respondent Union to assume full liability for the back pay accruing to Pense during this

¹³ Alleged copies of certain correspondence between the parties herein submitted to the Board subsequent to the issuance of the Intermediate Report indicate that the Respondent Union has notified the Respondent Company and Pense that it has no objection to the Respondent Company's reemployment of Pense and that the Respondent Company has made an offer of employment to Pense, which was rejected. However, as these are not facts established in the record itself, we shall issue our usual remedial order, leaving such matters to the compliance stage of this proceeding.

period.¹⁴ Back pay shall be computed in a manner consistent with the Board's policy set forth in *F. W. Woolworth Co.*¹⁵

We shall also order the Respondent Company to make available to the Board, upon request, payroll and other records to facilitate the checking of the amount of back pay due. In addition, we shall direct that the Respondent Union, in writing, notify the Respondent Company, and furnish copies to the employee involved, that it has no objection to the employment of Pense. The Respondent Union shall not be liable for any back pay accruing after 5 days from the date of such notices are given.

2. In view of our finding that the Respondents violated the Act by maintaining in existence illegal union-security provisions, certain of which were included in the 1954 agreement between the Respondent,¹⁶ we shall order the Respondents to cease and desist from agreeing to, continuing in force, or giving effect to union-security provisions not authorized by Section 8 (a) (3) of the Act.

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations

¹⁴ Cf. *Utah Construction Co.*, 95 NLRB 196, and *Pacific American Shipowners Association, et al.*, 98 NLRB 582.

¹⁵ 90 NLRB 289.

¹⁶ Except for the fact that the payment of general assessments is not made a condition of employment, the union-security provisions of the 1954 contract are the same as those in the contract before us.

Act, as amended, the National Labor Relations Board hereby orders that:

1. The Respondent, Convair, A Division of General Dynamics Corporation, its officers, agents, successors, and assigns shall:

a. Cease and desist from:

(1) Agreeing to, continuing in force, or giving effect to illegal union-security provisions in any collective bargaining agreement with International Association of Machinists, Guided Missile Lodge 1254.

(2) Encouraging membership in International Association of Machinists, Guided Missile Lodge 1254, or in any other labor organization of its employees, by discriminating as to its employees in regard to their hire or tenure of employment, or any term or condition of their employment.

(3) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Offer to Charles E. Pense immediate and full reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights and privileges.

(2) Jointly and severally with International Association of Machinists, Guided Missile Lodge 1254, make Charles E. Pense whole for any loss of pay he may have suffered by reason of their discrimination against him, in the manner set forth in Section V, entitled "The remedy."

(3) Upon request, make available to the Board or its agents, for examination and copying, all pertinent records necessary to analyze the amount of back pay due under this Order.

(4) Post in conspicuous places at its place of business in Pomona, California, in all locations where notices to employees are customarily posted, copies of the notice attached hereto and marked "Appendix A."¹⁷ Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent Company's representative, be posted immediately upon receipt thereof, and be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Company to insure that said notices shall not be altered, defaced, or covered by any other material.

(5) Notify the Regional Director for the Twenty-first Region, in writing, within ten (10) days from

¹⁷ In the event this Order is enforced by a decree of a United States Court of Appeals, this notice shall be amended by substituting for the words "A Decision and Order," the words, "A Decree of the United States Court of Appeals, Enforcing an Order."

the date of this Order, what steps it has taken to comply herewith.

2. The Respondent, International Association of Machinists, Guided Missile Lodge 1254, its officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Agreeing to, continuing in force, or giving effect to illegal union-security provisions in any collective bargaining agreement with Convair, A Division of General Dynamics Corporation, its officers, agents, successors, or assigns.

(2) Causing or attempting to cause Convair, A Division of General Dynamics Corporation, its officers, agents, successors, and assigns, to discriminate against Charles E. Pense or any other employee in violation of Section 8 (a) (3) of the Act.

(3) In any other manner restraining or coercing employees of Convair, A Division of General Dynamics Corporation, its successors or assigns, in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Jointly and severally with Convair, A Division of General Dynamics Corporation, make Charles E. Pense whole for any loss of pay which he may have suffered by reason of their discrimi-

nation against him, in the manner set forth in Section V, entitled "The remedy."

(2) Notify the Respondent Company and Charles E. Pense, in writing, that it has no objection to the employment of Pense and that it will not in the future request the discharge of said Pense or any other employee for a reason other than a failure to tender monthly union dues or initiation fees uniformly required to acquire or maintain membership in the Respondent Union as a condition of employment, under an agreement authorized by Section 8 (a) (3) of the Act.

(3) Post at its offices and meeting halls in Pomona, California, copies of the notice attached hereto and marked "Appendix B."¹⁸ Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by an authorized representative of the Respondent Union, be posted by it immediately upon receipt thereof, and be maintained by it for a period of at least sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that such notices are not altered, defaced, or covered by any other material.

(4) Mail to the Regional Director for the Twenty-first Region signed copies of the notice attached hereto as Appendix B, for posting, the Respondent Company willing, at its place of business at

¹⁸ Ibid.

Pomona, California, in places where notices to employees are customarily posted. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being signed as provided in the preceding paragraph of of this Order, be forthwith returned to the Regional Director for posting.

(5) Notify the Regional Director for the Twenty-first Region in writing, within ten (10) days from the date of this Order, what steps it has taken to comply herewith.

Dated, Washington, D. C. March 22, 1955.

[Seal] GUY FARMER, Chairman
 ABE MURDOCK, Member
 IVAR H. PETERSON, Member
 PHILIP RAY RODGERS, Member
 National Labor Relations Board

APPENDIX A

Notice to All Employees Pursuant to a Decision and
and Order of the National Labor Relations
Board, and in order to effectuate the policies of
the National Labor Relations Act, as amended,
we hereby notify our employees that:

We will not agree to, continue in force, or give
effect to illegal union-security provisions in any col-
lective bargaining agreement with International As-
sociation of Machinists, Guided Missile Lodge 1254.

We will not encourage membership in Interna-
tional Association of Machinists, Guided Missile Di-

vision 1254, or in any other labor organization of our employees, by discriminating against our employees in regard to their hire or tenure of employment, or any term or condition of their employment.

We will not in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We will offer to Charles E. Pense immediate and full reinstatement to his former or substantially equivalent position without prejudice to any seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay suffered as a result of the discrimination against him.

All our employees are free to become, remain, or to refrain from becoming or remaining members in good standing in the above-named Union or any other labor organization, except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

Convair, a Division of General Dynamics
Corporation
(Employer)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to All Members of International Association of Machinists, Guided Missile Lodge 1254 Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We will not agree to, continue in force, or give effect to illegal union-security provisions in any collective bargaining agreement with Convair, a Division of General Dynamics Corporation, its officers, agents, successors, or assigns.

We will not cause or attempt to cause or attempt to cause Convair, a Division of General Dynamics Corporation, its officers, agents, successors, and assigns, to discriminate against Charles E. Pense or any other employee in violation of Section 8 (a) (3) of the Act.

We will not in any other manner restrain or coerce employees of Convair, a Division of General Dynamics Corporation, its successors or assigns, in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of

employment, as authorized by Section 8 (a) (3) of the Act.

We will notify the above named corporation, in writing, and furnish a copy of such notification to Charles E. Pense, that we have no objection to his employment by said company.

We will make Charles E. Pense whole for any loss of pay suffered as a result of the discrimination against him.

International Association of Machinists,
Guided Missile Lodge 1254
(Labor Organization)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Affidavit of Service by Mail and Postal Return
Receipts Attached.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS, GUIDED MISSILE LODGE
1254, Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a consolidated proceeding had before said Board, entitled, “Convair, A Division of General Dynamics Corporation and Charles E. Pense, An Individual”, Case No. 21-CA-1911; “International Association of Machinists, Guided Missile Lodge 1254 and Charles E. Pense, An Individual”, Case No. 21-CB-561 before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner James R. Hemingway on July 12 and 13, 1954, together with all exhibits introduced in evidence.

2. Copy of Trial Examiner Hemingway's Intermediate Report and Recommended Order (annexed to item 6 hereof) and copy of order transferring cases to the National Labor Relations Board, both dated August 23, 1954, together with affidavit of service and United States Post Office return receipts thereof.

3. Respondent Union's exceptions to the Intermediate Report received October 4, 1954.

4. Respondent Union's request for oral argument received October 4, 1954. (Request denied. See page 1, paragraph 1 of Decision and Order).

5. General Counsel's exceptions to the Intermediate Report received October 4, 1954.

6. Copy of Decision and Order issued by the National Labor Relations Board on March 22, 1955, with Intermediate Report and Recommended Order annexed, together with affidavit of service and United States Post Office return receipts thereof.

7. Copy of affidavit of service of Decision and Order mailed to Charles E. Pense on April 12, 1955.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor

Relations Board in the city of Washington, District of Columbia, this 18th day of May, 1956.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary,
National Labor Relations
Board.

[Endorsed]: No. 15099. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Association of Machinists, Guided Missile Lodge 1254, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: May 22, 1956.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15099

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS, GUIDED MISSILE LODGE
1254, Respondent.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, International Association of Machinists, Guided Missile Lodge 1254, its officers, agents, successors, and assigns. The consolidated proceeding resulting in said order is known upon the records of the Board as "Convair, A Division of General Dynamics Corporation and Charles E. Pense, An Individual, Case No. 21-CA-1911"; "International Association of Machinists, Guided Missile Lodge 1254

and Charles E. Pense, An Individual, Case No. 21-CB-561.”

In support of this petition the Board respectfully shows:

(1) Respondent is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on March 22, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof post-paid, bearing Government frank, by registered mail, to Respondent's representative.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that

this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

Dated at Washington, D. C., this 10th day of April, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board.

Certificate of Service Attached.

[Endorsed]: Filed Apr. 12, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

RESPONDENT'S ANSWER TO PETITION
FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS
BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit

The Respondent, International Association of
Machinists, Guided Missile Lodge 1254, respectfully
resists the National Labor Relations Board's Peti-
tion for Enforcement of its Order, known upon its

records as "International Association of Machinists, Guided Missile Lodge 1254 and Charles E. Pense, an Individual, Case No. 21-CB-561", and in answer to its Petition, the Respondent respectfully answers:

(1) The Respondent admits that it is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this Judicial Circuit.

(a) Respondent denies that any unfair labor practice occurred.

(b) The Respondent admits that this Court has jurisdiction of the Board's Petition for Enforcement by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) The Respondent admits that upon due proceedings had before the Board in said matter, the Board, on March 22, 1955, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers and agents, successors and assigns; and that, on the same date, the Board's Decision and Order was served upon Respondent in the style, form, and manner, therein stated.

Wherefore, the Respondent prays this Honorable Court that it cause notice of the filing of this answer to be served upon the Petitioner; that this Court take jurisdiction of the proceeding, and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon

the Order made thereupon a decree denying in whole said Order of the Board.

Dated at Washington, D. C., this 25th day of April, 1956.

/s/ PLATO E. PAPPS,
Chief Counsel, International
Association of Machinists.

[Endorsed]: Filed Apr. 30, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
THE NATIONAL LABOR RELATIONS
BOARD INTENDS TO RELY

The Board properly found that the Union violated Section 8(b)(2) and 8 (b)(1)(A) of the National Labor Relations Act (61 Stat. 136, 29 U.S.C., Sec. 151 et seq.), by maintaining an illegal union-security agreement with Convair, a Division of General Dynamics Corporation, and by causing that company to discharge an employee pursuant to that agreement.

Dated at Washington, D. C., this 18th day of May, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board.

[Endorsed]: Filed May 21, 1956. Paul P. O'Brien,
Clerk.

Before the National Labor Relations Board
Twenty-First Region

Case No. 21-CA-1911

In the Matter of:

GENERAL DYNAMICS CORPORATION,

and

CHARLES E. PENSE, an Individual.

Case No. 21-CB-561

In the Matter of:

INTERNATIONAL ASSOCIATION OF MA-
CHINISTS, GUIDED MISSILE LODGE
1254,

and

CHARLES E. PENSE, an Individual.

Hearing Room No. 1, Room 704, 111 West Sev-
enth Street, Los Angeles, California. Monday, July
12, 1954.

Pursuant to notice, the above-entitled matter
came on for hearing at 10:00 o'clock, a.m.

Before: James R. Hemingway, Trial Examiner.

Appearances: Ernest L. Heimann, 111 West Sev-
enth Street, Los Angeles, 14, California, appearing

on behalf of the General Counsel of the National Labor Relations Board. [1*]

Charles E. Pense, 6526-A Marbrisa Avenue, Huntington Park, California, appearing on behalf of himself.

Robert B. Watts and C. C. Sawyer, 3165 Pacific Highway, San Diego 12, California; and H. D. Filloon, P. O. Box 1011, Pomona, California, appearing on behalf of General Dynamics Corporation.

A. C. McGraw, Room 600 Van Nuys Building, 210 West Seventh Street, Los Angeles 14, California, appearing on behalf of the International Association of Machinists, Guided Missile Lodge 1254.

PROCEEDINGS

* * * * *

Mr. Heimann: At this time, Mr. Examiner, I would like to offer the formal exhibits for the General Counsel being:

Exhibit 1-A, the Charge against the International Association of Machinists, Guided Missile Lodge No. 1254 which I will refer to hereafter as the union;

Exhibit 1-B being the Charge against Consolidated [5] Vultee Aircraft Corporation, Pomona Division, which I will refer to hereafter as the company;

Exhibit 1-C being Affidavit of Service of the ini-

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

tial C Letter and copy of Charge on the Union with return receipt attached;

Exhibit 1-D being Affidavit of Service of initial C Letter and copy of Charge on the Company with return receipt attached;

Exhibit 1-E being Order Consolidating the two cases that are the subject of this case and Notice of Hearing dated April 30, 1954;

Exhibit 1-F, being the Consolidated Complaint in these two cases, dated April 30, 1954;

Exhibit 1-G being the Affidavit of Service of Order Consolidating the cases and Notice of Hearing, Consolidated Complaint and copies of Charges with return receipts attached and signed on behalf of the Company, the Union and Charles E. Pense;

Exhibit 1-H being an Order Rescheduling Hearing, rescheduled from May 24 to July 12, 1954;

Exhibit 1-I being the Affidavit of Service of Order Rescheduling Hearing with return receipts attached, signed by and on behalf of the Company, the Union and Charles E. Pense;

Exhibit 1-J being an Order Extending Time for Filing of [6] Answer, dated May 13, 1954.

Exhibit 1-K being Affidavit of Service of Order Extending Time for Filing of Answer with return receipts attached, signed by and on behalf of the Company, the Union and Charles E. Pense;

Exhibit 1-L being the Answer of the Union; and 1-M being the Answer of the Company.

I now offer General Counsel's Exhibit 1-A through 1-M in evidence.

* * * * *

Trial Examiner: All right, General Counsel's Exhibit 1, including all parts from A to M, inclusive, is received in evidence. * * * * * [7]

Mr. Sawyer: In view of the matter contained in the company's answer and the actual facts of the situation so far as the corporate name of the company is concerned, we think appropriate to move, make a motion at this time that General Dynamics Corporation be submitted as respondents herein in place of Consolidated Vultee Aircraft Corporation for the reason that, effective as of the close of business April 30, 1954, as a result of a merger, Consolidated Vultee Aircraft Corporation was merged into and with General Dynamics Corporation and, as a result thereof, the name of Consolidated Vultee Aircraft Corporation was changed to General Dynamics Corporation.

* * * * *

Trial Examiner: All right. The Complaint and the Answers, then, are amended in accordance with the motion. The motion is granted. [8]

* * * * *

Mr. Heimann: Mr. Examiner, at this time I would like to offer the following stipulations:

Number one, that the commerce facts as stated in the Answer of the company in Paragraph 1 and that these facts should be considered the true facts rather than the facts alleged in Paragraph 1 of the Consolidated Complaint.

Trial Examiner: Let's have each one agreed on as they go ahead if they are distinct.

Do you so stipulate? [9]

Mr. McGraw: We accept any stipulation the company prepares concerning its own business.

Trial Examiner: Mr. Sawyer?

Mr. Sawyer: Yes.

* * * * *

Mr. Heimann: My next stipulation is that Mr. Pense, the charging party was employed by the company in San Diego from March 9, 1951, until his transfer to Pomona on January 19, 1953, and by what was then known as Convair's Guided [10] Missile Division in Pomona from January 19, 1953, until his discharge on January 15, 1954.

Mr. Sawyer: We so stipulate.

Mr. McGraw: We join in the stipulation.

* * * * *

Mr. Sawyer: By way of explanation, I note that reference is made to the Guided Missile Division, and to explain that, when the operations at Pomona, California, were first started, it was originally named Guided Missile Division.

Thereafter, or a very short time thereafter, it was changed to Pomona Division so that the reference here to Guided Missile Division is the same as the references in the company's Answer to the Pomona Division.

Trial Examiner: All right. Is that so stipulated?

Mr. Heimann: That is satisfactory. I stipulate to that.

Mr. McGraw: So stipulate.

Mr. Heimann: The next stipulation, Pense was a member of the Guided Missile Lodge 1254 since on or about October 1, 1952. He remained a member

of Lodge 1254 and paid dues through check-off until and including August 1953. [11]

Mr. McGraw: We so stipulate.

Mr. Sawyer: In regard to that stipulation, we stipulate that based on our information and belief, Mr. Pense was a member of said union and we do stipulate in regard to the check-off of dues by the company.

* * * * *

Mr. Heimann: Now, as I take it, for the purpose of decision, that can be taken as an admission of what I stated by the company, in other words, that everything is covered.

Trial Examiner: I take it that the company accepts the fact to be that he was a member and doesn't require proof.

Mr. Sawyer: That is correct.

Mr. Heimann: Fine.

The next stipulation, Pense revoked his check-off authorization by letter dated August 1, sent registered to the company and the union. This letter was received by the company on August 6th and by the union on or about the same date and, in any case, prior to August 15th. All these dates are referring to 1953.

Mr. McGraw: We so stipulate. [12]

* * * * *

Mr. Heimann: Next stipulation, Pense did not pay dues for September, 1953, or any months thereafter and did not tender payment of his dues until January 7, 1954.

Trial Examiner: Did not tender, you say?

Mr. Heimann: Did not tender payment of dues.

Mr. McGraw: I think we have one slight diversion here, counsel. In characterizing this payment as a payment of dues, I think it might be wrong and I'm sorry I didn't notice it before. Certainly, he didn't pay any dues after September and made no offer and that the first offer of money was on January 7, 1954. We have no argument there. We say that was, in effect, a reinstatement that he was offering if there is any distinction to be made.

Mr. Heimann: I'm willing to accept the wording, [13] "did not tender payment of any money until January 7, 1954."

Mr. McGraw: Good deal.

Trial Examiner: And the company, will you stipulate?

Mr. Sawyer: In agreeing to that stipulation, the respondent would, of course, have no knowledge of Pense's relationship with the union in regard to when he paid dues and whether or not they were payment of dues within the meaning of the contract here involved.

We believe that the stipulation when it refers to the payment of dues might well say payment of dues in accordance with the constitution and by-laws of the union since that is the contract requirement.

Trial Examiner: You mean that Pense did not pay dues in accordance with the constitution and by-laws of the union?

Mr. Sawyer: Since that contract requirement.

Trial Examiner: For September or thereafter, is that what you mean?

Mr. Sawyer: Right.

If I may have the stipulation amended to include that phrase, the respondent agrees on this basis that it was advised by Lodge 1254 in writing on or about December 8, 1953, again, on or about December 17, 1953, and, again, on or about January 15, 1954, that Charles E. Pense had failed to pay union dues in accordance with the constitution and by-laws of Lodge 1254. [14]

Our attempt is to agree with this stipulation based upon giving the basis of our agreement. That is our attempt.

Trial Examiner: Is Mr. Sawyer's proposed amendment acceptable to you, Mr. Heimann?

Mr. Heimann: Yes, it is.

Mr. McGraw: It is to us, too.

Mr. Trial Examiner, actually what he is doing is putting in words—maybe I was silly for assuming that—certainly at all times we are talking about the dues due under the constitution or by-laws under the contract, or both, and we are not talking about anything outside of that.

* * * * *

Trial Examiner: Do you have any more stipulations?

Mr. Heimann: Oh, yes. We will try to cover most of the case by stipulation, Mr. Examiner.

On January 7, 1954, Pense handed a check for \$17.50 to Dave Provan, P-r-o-v-a-n, shop committeeman of the union. Provan phoned the office of

the union and was told that Pense's [15] dues came too late since he had been dropped from membership and the check could not be accepted until Pense's reinstatement was voted upon by the union's membership.

Provan related this message to Pense and returned the check.

* * * * *

Mr. Sawyer: We have no information to the contrary and therefore agree.

Trial Examiner: All right.

Mr. Heimann: On the same day, or the next day, Pense went to see John King, financial secretary of the union, and offered to pay back dues in the amount of \$17.50. King repeated substantially the same information that had been given Provan by the union office and King told Pense in order to get reinstated he had to fill out an application.

Pense filled out that application.

Mr. McGraw: We so stipulate.

Mr. Sawyer: The company has no information to the contrary as to these things that went on between Pense and the union so we stipulate. [16]

Mr. McGraw: We agree it was none of the company's business.

Mr. Heimann: The next stipulation, on December 7, 1953, the union sent to the company a letter which I will identify as General Counsel's Exhibit No. 3 which was sent to the company on or about the date of that letter and received by the company on December 8, 1953.

Mr. Sawyer: We so stipulate, this being the

quoted wording referred to in respondent's Answer, Paragraph 5, as being a written request received by respondent on December 8, 1953.

Mr. McGraw: We accept the stipulation.

Mr. Heimann: I accept the stipulation. And, of course, I will enter the copies in evidence.

Mr. McGraw: Counsel, I notice you had one other document a few moments ago that you were reserving to offer and at that time you did not identify that. Is it my understanding that that was to be G.C. No. 2?

Mr. Heimann: That is correct, that refers to revocation of the check-off by Mr. Pense.

Mr. McGraw: All right, thank you.

Mr. Heimann: The next stipulation, on December 17, 1953, the union sent to the company a letter which I will offer in evidence as G.C. 4 and which was received by the company in due course of mail. [17]

Mr. Sawyer: We agree and so stipulate said letter being the quoted wording referred to in respondent's Answer in Paragraph 5 as being a written request received from Lodge 1254 on or about December 17, 1953.

Mr. McGraw: We accept the stipulation.

* * * * *

Mr. Heimann: The next stipulation, on January 14, 1954, the union held a membership meeting at which the application for reinstatement to union membership of Delbert Ainsworth was accepted.

Trial Examiner: At which the membership, you say, was accepted?

Mr. Heimann: The application for reinstatement to membership.

Mr. McGraw: Is that all? Are you going to offer more?

Mr. Heimann: No, I'm not through yet.

Trial Examiner: Would you spell the name?

Mr. Heimann: A-i-n-s-w-o-r-t-h.

And Pense's application for reinstatement was rejected. [18]

Trial Examiner: So stipulated?

Mr. Heimann: Just a minute.

At the request of Mr. McGraw expressed at the pre-hearing conference, I also offer to stipulate that at that same meeting the applications of others for membership were also acted upon and I'm offering that without conceding the materiality thereof but I agree it is a fact.

Mr. Sawyer: The respondent, based upon the written information referred to in Paragraph 5 of its Answer as having been received by respondent on January 15, 1954, stipulates that at that time it was advised by that writing that such application of Ainsworth had been accepted at a meeting held by the union, by Lodge 1254, held January 14, 1954, and that at that same meeting the application of Mr. Pense had been rejected. Respondent has no evidence to the contrary and does not intend to offer any as to this last matter, namely, that the application of others for membership were also acted upon. The respondent has no knowledge but does not intend to offer any evidence to the contrary and, therefore, on that basis is willing to so stipulate.

Mr. McGraw: Mr. Trial Examiner, we, of course, object to the introduction of this in evidence in any form on the grounds it is immaterial and even when true does not go to prove or disprove any of the issues in the case. We think this is wholly unrelated to the issues and we think that it [19] should be excluded on the grounds, I think, as immaterial and irrelevant.

We do admit, however, that these are facts and we don't dispute them as facts. We object to their admission on the grounds of relevance principally and materiality.

Trial Examiner: In view of the fact that it does tend to support one theory of General Counsel's case I accept the stipulation.

Mr. McGraw: We, of course, take this as an adverse ruling and take exception. [20]

* * * * *

Mr. Heimann: The next stipulation, on January 15, 1954, the union sent to the company a letter which I will offer in evidence as G.C. Exhibit No. 5 and which was received by the company on January 15, 1954.

That is the end of that stipulation.

Mr. McGraw: We so stipulate. [21]

Mr. Sawyer: And the respondent so stipulates, this being the written request referred to in Paragraph 5 of the respondent's letter.

Trial Examiner: The respondent's Answer?

Mr. Sawyer: Respondent's Answer which the respondent therein states was received on or about January 15, 1954.

Mr. Heimann: The next stipulation, Pense was discharged by the company on January 15, 1954, as a result of the union's request for his discharge pursuant to the contract.

Mr. McGraw: We accept the stipulation.

Is that all of that one?

Mr. Heimann: No, I'm adding and I will offer that contract as G. C. Exhibit No. 6.

Mr. McGraw: We accept the stipulation.

Mr. Heimann: The union's request for Pense's discharge pursuant to the contract was the sole reason for Pense's discharge. His work and conduct were satisfactorily at all times.

Mr. Sawyer: Respondent so stipulates, request referred to in the stipulation being the writing referred to in respondent's Answer, Paragraph 5, and the stipulation also being consistent with respondent's Paragraph 14 of respondent's Answer.

* * * * *

Mr. Heimann: I'm not sure if the record shows whether Mr. McGraw has stipulated or agreed to my last stipulation.

Mr. McGraw: I have not and one or two comments there. We believe that that is a fair statement. So far as we know, the company did discharge him at our request and for no other reason. If there are any other reasons, we don't know of them and with that qualification we are willing to accept the stipulation.

Mr. Heimann: That is satisfactory. [23]

The next stipulation, Pense instituted appropriate grievance procedures over his discharge under

the terms of the contract. A full hearing was afforded to all parties and the decision in the grievance procedure was adverse to Pense. The sole issue considered in the grievance procedure was whether Pense's discharge was warranted under the union security clause of the contract then in effect which I will offer as G. C. 6. The legality of the union security clause and the disparity, or alleged disparate treatment of Pense were not issues that were considered in the grievance procedure.

Furthermore, the case did not go to arbitration.

Mr. Sawyer: The respondent company so stipulates.

Mr. McGraw: The respondent union believes that that is a fair statement and is willing to accept it. In some respects, I happen to be without knowledge, but I think it really immaterial to the issues here and we have no quarrel with the way it's stated. [24]

* * * * *

Mr. Heimann: At the request of Mr. Sawyer, I am willing to offer and join in the following stipulation, again, without conceding the materiality but as far as my information goes, they are facts and I have no information to the contrary.

The stipulation is that the contract here involved has never been held invalid or illegal by any court, administrative body or governmental agency. At no time has there ever been a request by the respondent union to the respondent company to enforce by discharge or otherwise the provisions of Article 14 of the said contract insofar as referring

to the payment of general assessments. At no time has the respondent company ever been requested to deduct any amount from an employee's pay covering general assessments.

Now, I want to reiterate that I have no knowledge regarding these facts but I have no contrary evidence and am, therefore, willing to stipulate that they are facts.

Mr. McGraw: We accept the stipulation.

Mr. Sawyer: And respondent company [33] accepts the stipulation. [34]

* * * * *

Trial Examiner: I will receive now General Counsel's Exhibits 2, 3, 4 and 5. [36]

[See pages 140-143 for Exhibits 3, 4 and 5.]

* * * * *

Mr. Sawyer: May we assume that as this is accepted that we are stipulating facts in the Complaint to the effect that this contract was in effect during all the time herein mentioned up to and including approximately 1 February 1954?

Mr. McGraw: That is correct.

Mr. Heimann: That is correct.

Mr. Sawyer: We have no objection to the introduction in evidence.

Trial Examiner: The union, I believe, stated no objection?

Mr. McGraw: No objection.

Trial Examiner: General Counsel's Exhibit 6 is received in evidence. [37]

[See pages 144-145.]

* * * * *

Trial Examiner: General Counsel's Exhibit 7 is received in evidence. [38]

[See pages 145-146.]

* * * * *

Trial Examiner: Is there any contention on the part of any of the parties, and I think this might be specifically the General Counsel's if anyone's that the notice which Mr. Pense gave to the union and the company on August 1, 1953, was intended to be a notification of termination of membership rather than just termination of check-off authorization?

Mr. Heimann: There is no such contention on the part of General Counsel. The letter of Mr. [40] Pense, I think, is clear that it was intended only as revocation of the check-off authorization and we do not contend that any other interpretation should be put on it.

Trial Examiner: Do I understand the union to be in agreement?

Mr. McGraw: We certainly accepted and acted on this as though it was exclusively restricted to stopping the deduction of the dues and not to cancel the membership. We consider it as a written document sufficient and specific and pointed enough to where it could have no other meaning.

Mr. Heimann: In this connection, Mr. Examiner, in order to eliminate any misleading inference which might arise from my mentioning of the date of the receipt by the union of the revocation of Mr. Pense, I have stated that and it has been stipu-

lated that the revocation was received by the company on August 6th and by the union on or about August 6th and, in any case, before August 15. The reason that I mentioned that date is that the check-off authorization itself provides for its revocation, among other things, by written notice to the company.

Trial Examiner: That is a matter of evidence I assume you will introduce.

Mr. McGraw: The language on this check-off authorization is spelled out in the contract and follows Section 7, Page 27 and carries over to Page 28 of General Counsel's Exhibit [41] No. 6.

* * * * *

CHARLES E. PENSE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Heimann): Mr. Pense, at the time you executed and mailed the revocation of your check-off authorization, was it your intention to revoke your check-off authorization or was it your intention to withdraw from the union?

A. Purely to revoke my check-off deduction because of extreme financial straits that I found myself in at that time.

I had no intention of withdrawing from [120] the union even though the same clause would have

(Testimony of Charles E. Pense.)

given me the choice. I could have written one letter as well as the other. [121]

* * * * *

Mr. Heimann: I would state that that is not my position that any assessments were included in that amount.

* * * * *

Trial Examiner: On the record.

Mr. McGraw: As a result of our discussion, I believe the parties are in agreement that under the union rules and laws that Mr. Pense in offering \$17.50, if he had been accepted would have actually have received credit for initiation fee of \$7.00, the equivalent of two months' dues, and the balance would either have been refunded or given to his credit for dues in advance. That the amount is determined by our rules and the decision as to whether or not he returns to membership is controlled by a vote of the membership.

Trial Examiner: Are you joining in that stipulation?

Mr. Heimann: Yes, I think I can.

Mr. Sawyer: I know nothing about it. I have no evidence to the contrary.

Trial Examiner: There is one question I'd like to ask. [126] From what I have heard, I would assume, and you can correct me if I am wrong, that the union does not take the position that there was anything wrong with Mr. Pense's application for reinstatement by virtue of the fact that he did not again tender the same amount?

Mr. McGraw: No, in fact, at the time the union acted on Mr. Pense's application, it had no money pending and was not insisting on any. It had already returned the offer and it was making no condition that it wasn't acting on the application unless a tender was accompanying it.

That was not an issue, and to the best of my knowledge, was given no consideration whatsoever. The understanding, I think, was clear that if he was accepted he would pay the proper amount. I don't think anyone questioned either his intentions or his ability to pay.

So far as I know it had no part in the proceedings at any stage. [127]

* * * * *

Mr. McGraw: I now offer a stipulation a copy of which has been given the reporter and request that it be copied into the record with the corrections which are noted on it which occurred because of our off the record discussion.

Trial Examiner: Will you copy it in at this point?

Stipulation

Lodge #1125, IAM, has been the recognized bargaining agent for the production and maintenance employees of the Consolidated Vultee Aircraft Corporation in its San Diego operations for more than ten years.

What is now the Pomona Division or the Guided Missile Division of the Company was first formed as a department or part of the San Diego Division in 1951.

By March, 1951, this Division was so clearly distinguishable from the other operations of the Company in San Diego that the Company and the International Association of Machinists executed a separate labor agreement for the [133] Guided Missile Division effective March 1, 1951. This contract was succeeded by a labor agreement dated December 24, 1951, and thereafter by a labor agreement dated December 16, 1952, now in evidence and identified as General Counsel Exhibit #6.

Later the work and the people who were doing the work in San Diego were moved to the present location in or near Pomona. Following this move and the location of work, the IAM established Lodge #1254 and transferred the affected membership from Lodge #1125 to Lodge #1254 as of October 1, 1952.

The first agreement between the IAM and the Company for the Guided Missile Division which was effective March 1, 1951, contained the same "Union Security" clause as that contained in the then current labor agreement between the Company and Lodge #1125, IAM, for the other production and maintenance employees in San Diego.

This "Union Security" clause provided in Article XIV, Section 1, and we quote:

"The Company, for the convenience of the Union and its members, agree to deduct from the pay of those employees who execute the form as set forth in Section Two of this Article and are in the bargaining unit, initiation fees, monthly dues, and general assessments levied by the International

Association of Machinists, [134] in accordance with the constitution and by-laws of the Union, and upon presentation to the Company of the fully executed authorization card as set forth in Section Two of this Article."

Membership in the Union as a condition of employment was not provided for in any form by the labor agreement. The particular language quoted above was first adopted by the parties in the agreement signed August 16, 1948.

The present language governing union security was first contained in the agreement now in evidence as General Counsel Exhibit #6. [135]

* * * * *

Trial Examiner: What is your reason for wanting this in, Mr. McGraw?

Mr. McGraw: Essentially so that somebody back in Washington and you won't think we are withholding something and there is some vital gap in here. The purpose, however, for which it is best suited, I think, Mr. Trial Examiner, goes to the point that this does show for whatever it is worth and I grant you questionable worth is to show what the parties had done with particular reference to this thing of deducting assessments in the past and as a means of showing how the parties got in this way to the contract which is now in issue.

I think we need a rather complete record on this particular point so that no one can have cause to think we are withholding anything or that there is something that doesn't meet the eye.

Trial Examiner: Are you so stipulating, Mr. Sawyer?

Mr. Sawyer: I have not, of course, proofread that quoted wording in there, I mean the quoted wording from the so-called union security clause.

I understand the parties will check that with the contracts and if there happens to be a typographical error that will be changed. Otherwise, I so stipulate that the matters and things set out in the stipulation as presented [136] are, in fact, our knowledge of the situation.

Mr. Heimann: I would like to state, if I may, I have no information to the contrary. I do have, I believe I do have some source whereby I may check the accuracy of the information. If I should determine that something is inaccurately stated I would like to reserve the right to rescind my stipulation.

Otherwise, with that understanding, I'm willing to stipulate to the facts again urging my objection on the basis of immateriality and irrelevance.

Trial Examiner: I agree, it is not pertinent to the issues at hand. On the other hand, as background, I don't think it does any harm either so I will receive the stipulation.

Mr. McGraw: Thank you. [137]

* * * * *

Mr. Heimann: The reason that I'm offering this document is to point out Article XIV of this agreement which now omits in all its parts the words "and assessments," or "and general assessments," whatever the words were in G. C. No. 6.

Trial Examiner: Any objection to the receipt in evidence?

Mr. McGraw: No objection.

We will certainly agree with counsel for the Board that we took the word "assessment" out.

Trial Examiner: There being no objection, General Counsel's Exhibit 9 is received in evidence.

(Thereupon the document above-referred to was marked General Counsel's Exhibit No. 9 and was received in evidence.) [138]

[See pages 147-148.]

* * * * *

Trial Examiner: You are through now, are you, Mr. Heimann?

Mr. Heimann: Yes.

* * * * *

Mr. McGraw: At this time, Mr. Trial Examiner, I would [139] like to move to dismiss the case against the respondent union and in all of its particulars on the grounds the General Counsel's case carried no proof of allegations of wrong doing made in the Complaint.

Trial Examiner: Do you wish to argue that?

Mr. Heimann: Mr. Examiner, if I argue it, it really would amount to my final argument. However——

Trial Examiner: Before you say anything, I want to ask Mr. McGraw whether he is directing his motion to all aspects of the General Counsel's case.

Mr. McGraw: As it affects the union, yes, sir.

Trial Examiner: I don't believe I will ask for argument. I will deny the motion at this time. [140]

* * * * *

JOHN M. KING

a witness called by and on behalf of the Respondent Union, being first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. McGraw): Mr. King, where are you employed?

A. I am employed by Lodge 1254, I.A.M.

Q. What capacity?

A. Financial secretary.

Q. How long have you been employed there?

A. Full time since August 1. On a part time basis from——

Trial Examiner: August 1, 1953?

The Witness: Yes, '53. Part time basis from 1952, January of 1952. [230]

* * * * *

Q. Now, do you know of your own knowledge as financial secretary of the lodge whether or not any employees, any employed employees in the Pomona Division would on occasion be sent to San Diego to work and come back up here so that they were between the two places?

A. Yes, as of October 1. [234]

Q. Of what year?

(Testimony of John M. King.)

A. Of 1952. Convair, the Grand Lodge had transferred approximately 560 people into Lodge 1254. It was not handled in the process generally known as a transfer slip.

All the records in San Diego were sent up to me at that time. If they had been done in the regular procedure, the errors would have been picked up in the recording in San Diego. Otherwise, when I received it, whatever error was in the account, I had to take it as it was and work it out at a later date which I did.

There were several accounts, numerous accounts, I should say, that weren't worked out until almost until about March or April of this year.

Q. Now, did this movement of personnel between San Diego, or Pomona and San Diego create any particular problems for the financial secretary in keeping the record?

A. Yes, it did because even though their accounts were transferred to Lodge 1254, the people remained in San Diego. Those that were paying cash in San Diego, I had to depend on the Grand Lodge Representative bringing their books up to me.

Then, also, a party would come to be transferred to Pomona. If he was a cash payment, I had no knowledge until such time as I saw the man.

Q. During this time and while there was still

(Testimony of John M. King.)

some traffic with part of the Guided Missile Division being in San Diego [235] and part of it up here in Pomona, during this time did you have any difficulty from the company in getting accurate information as to who was working and where they were working?

A. Yes, I did. I received two entire payroll deduction sheets. One would be from San Diego, the employee remaining in San Diego. The second one would be the employee in Convair Pomona. And in the time between—in order to get the picture I better think a moment.

By the time that the deduction sheet was made up and I received it, the party that was in San Diego had been transferred up to Pomona and, likewise, the man that had been in Pomona was transferred back to San Diego. [236]

* * * * *

Q. As part of your duty, are you required to send arrearage [240] notices? A. Yes, it is.

* * * * *

Q. (By Mr. McGraw): Do you know whether or not you sent any arrearage notices to Mr. Pense?

A. Yes, I did. [241]

* * * * *

Q. Do you know how many arrearage notices that you sent to Mr. Pense?

A. Three, I believe.

* * * * *

(Testimony of John M. King.)

Q. What were the dates on which they were sent?

A. October 19, 1953; November 10, 1953; November 27, 1953. [242]

* * * * *

Mr. McGraw: I intend to have them identified and offer them in evidence, the one dated 10-19-53 to be Respondent Union's Exhibit 2, the one for 11-10-53 to be Respondent Union's Exhibit 3, and the one for 11-27-53 to be Respondent Union's Exhibit 4.

(Thereupon the documents above referred to were marked Respondent Union's Exhibits Nos. 2, 3 and 4, inclusive, for identification.)

Mr. Heimann: I am willing to stipulate that the originals of the arrearage notices, notice of arrearages [243] that have been identified as Respondent Union's Exhibit 2, 3 and 4 were sent by the union to Mr. Pense on or about the dates appearing the right hand corner thereof and were received by Mr. Pense in due course of mail.

Mr. McGraw: Thank you kindly, counsel. We accept the stipulation.

We now offer these in evidence and request permission to substitute photostatic copies for them.

Mr. Heimann: No objection.

Trial Examiner: Respondent Union's Exhibits 2, 3 and 4 are received in evidence.

The union will await your compliance to the above subject set forth.

Very truly yours,

/s/ JOHN M. KING,
Financial Secretary
Lodge 1254, I.A.M.

cc: Walter Black

(Copy)

GENERAL COUNSEL'S EXHIBIT No. 4

(Letterhead of International Assn. of Machinists)

Mr. H. D. Filloon
Manager of Industrial Relations
Consolidated Vultee Aircraft Corp.
Pomona Division
Pomona, California

Subj: Employees in violation of Article XIV
Section I, as a condition of employment.

Dear Mr. Filloon:

The International Association of Machinists Guided Missile Lodge #1254 is hereby notifying Consolidated Vultee Aircraft Corp., Pomona Division, co-signers of the present contract between the Union and the company, that former Union Members, D. M. Ainsworth, Department 25, Clock Number 10341 and C. E. Pense, Department 27, Clock Number 70053, are not in compliance with Article XIV of our Agreement in that they have been

dropped from membership of our Association because of non-payment of dues in accordance with the Constitution and By-Laws of our Union.

We, therefore, request the company to immediately terminate the above employees in accordance with the terms of our Agreement.

Very truly yours,

/s/ JOHN M. KING,
Financial Secretary to
Lodge #1254

JMK:sh

cc: Walter Black

This is an exact copy of a carbon copy.

GENERAL COUNSEL'S EXHIBIT No. 5

Guided Missile Lodge 1254

International Association of Machinists A.F. L.

Pomona, California

Mr. H. D. Filloon

January 15, 1954

Manager of Industrial Relations

Consolidated Vultee Aircraft Corp.

Pomona Division

Pomona, California.

Dear Mr. Filloon:

In regards to the letter sent to you dated December 17, 1953 in which Guided Missile Lodge 1254, International Association of Machinists asked you

to terminate former Union Members, D. M. Ainsworth and C. E. Pense as a Condition of Employment in accordance with the terms of our Agreement.

I wish to advise you that action was taken by the membership of this lodge at the last meeting held January 14, 1954 and the decision set forth which is in accordance with the Constitution and By-Laws of our Union as follows;

D. A. Ainsworth, Application accepted and Reinstated as a member in good standing. Termination Request Cancelled.

C. E. Pense, Application rejected by the membership. Termination requested as per letter dated December 17, 1953.

Very truly yours,

/s/ JOHN M. KING,

Financial Secretary to

Lodge #1254

cc: Walter Black

This is to certify that the above is an exact copy of a carbon copy.

GENERAL COUNSEL'S EXHIBIT No. 6

Agreement between Consolidated Vultee Aircraft Corporation, Guided Missile Division and International Association of Machinists, Guided Missile Lodge No. 1254, Effective December 16, 1952.

* * * * *

Article XIV.

Union Security

Section 1. Any employee within the bargaining unit who, on the effective date of this agreement, is a member of the Union in good standing, and each employee within the bargaining unit who thereafter becomes a member of the Union shall pay while on the Company's active payroll and a member of the Union, initiation fees, monthly dues and general assessments levied by the International Association of Machinists, Guided Missile Lodge No. 1254, in accordance with the constitution and by-laws of the Union as a condition of employment while in the bargaining unit, provided that in no event shall the initiation fee, monthly dues or general assessment exceed the amount specified in the constitution and by-laws; and each employee who, after the effective date of this agreement, is separated from the bargaining unit and who at such time is subject to the provisions of this section shall, upon rehire within the bargaining unit, again pay regular dues to the Union commencing with the date of rehire; provided further, that any employee

may withdraw from membership in the Union by notifying the Union and the Company by registered mail, postmarked between August 1 to August 15 of the then currently effective yearly period.

Section 2. No employee, as a condition of employment while in the bargaining unit, shall be required to pay while on the Company's active payroll any Union membership dues, fees or general assessments covering any period during which the employee was not in the bargaining unit or was not on the Company's active payroll.

Section 3. Any employee subject to the provisions of Section 1 above, who is thereafter separated from the bargaining unit, shall upon his re-employment in a job within the bargaining unit again pay membership dues to the Union in accordance with Section 1 above, unless such employee has withdrawn from membership with the Union in accordance with this Article.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 7

International Association of Machinists
[Seal]

Constitution

Revised by the Committee on Law as recommended by the Twenty-Third Convention of the Grand Lodge of The International Association of Machinists, held in Kansas City, Missouri, Septem-

ber 8 to 19, 1952, and thereafter adopted by referendum vote in November, 1952, effective January 1, 1953, and amended by referendum vote in January, 1953, effective April 1, 1953.

Grand Lodge
International Association of Machinists
Machinists Building
Washington 1, D. C.

* * * * *

Article E

* * * * *

Membership Cancelled

Sec. 14. Delinquency for 3 months in the payment of dues or assessments shall automatically cancel membership and all rights, privileges and benefits incident thereto. The period of good standing membership of members whose membership has been cancelled for delinquency, or other cause shall date from their last reinstatement, as shown by the G. L. records, and their rights, privileges and benefits under the provisions of this Constitution shall attach and date from their last reinstatement, as though they had never before held membership in the I.A.M.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 9

Agreement between Consolidated Vultee Aircraft Corporation, Pomona Division and International Association of Machinists, District 120, Guided Missile Lodge 1254, Effective February 1, 1954.

* * * * *

Article XIV.**Union Security**

Section 1. Any employee within the bargaining unit who, on the effective date of this agreement, is a member of the Union in good standing, and each employee within the bargaining unit who thereafter becomes a member of the Union shall pay while on the Company's active payroll and a member of the Union, initiation fees and monthly dues of the International Association of Machinists, District 120, Guided Missile Lodge No. 1254, in accordance with the constitution and bylaws of the Union as a condition of employment while in the bargaining unit, provided that in no event shall the initiation fee or monthly dues exceed the amount specified in the constitution and bylaws; and each employee who, after the effective date of this agreement, is separated from the bargaining unit and who at such time is subject to the provisions of this section, shall, upon rehire within the bargaining unit, again pay regular dues to the Union commencing within the date of rehire; provided, further, that any employee may withdraw from membership in the

Union by notifying the Union and the Company by registered mail, postmarked between December 1st to December 15th of the then currently effective yearly period.

Section 2. No employee, as a condition of employment while in the bargaining unit, shall be required to pay while on the Company's active payroll any Union membership dues or fees covering any period during which the employee was not in the bargaining unit or was not on the Company's active payroll.

Section 3. Any employee subject to the provisions of Section 1 above, who is thereafter separated from the bargaining unit, shall upon his re-employment in a job within the bargaining unit again pay membership dues to the Union in accordance with Section 1 above, unless such employee has withdrawn from membership with the Union in accordance with this article. * * * * *

CERTIFICATE

This is to certify that the attached proceedings before the National Labor Relations Board for the 21st Region in the matter of: General Dynamics Corporation, et al. and Charles E. Pense, an individual. Case No. 21-CA-1911, 21-CB-561, Los Angeles, California, July 12, 13, 1954, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING COMPANY,
Official Reporters
By ADELE HENNINGSEN,
Field Reporter

No. 15099

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED
MISSILE LODGE 1254, RESPONDENT**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

THEOPHIL C. KAMMHOLZ,
General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

**OWSLEY VOSE,
MELVIN POLLACK,**

*Attorneys,
National Labor Relations Board.*

FILED

JUL 30 1956

PAUL P. O'BRIEN, CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 15099

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED
MISSILE LODGE 1254, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*),¹ for enforcement of its order (R. 99-101, 103-104)² issued on March 22, 1955, against respondent union following the usual proceedings under Section 10 of the Act.³

¹ The pertinent provisions of the Act are appended hereto (pp. 19-22, *infra*).

² References to the printed record are designated "R". References preceding a semicolon are to the Board's findings; references following a semicolon are to the supporting evidence.

³ The Board does not seek enforcement of the portion of its order (R. 97-99, 101-103), issued against Convair, a Division of General Dynamics Corporation, herein called the Company. The

This Court has jurisdiction of the proceeding, the unfair labor practices having occurred at Pomona, California, within this judicial circuit.⁴

The Board's Decision and Order are reported at 111 N. L. R. B. 1055.

STATEMENT OF THE CASE

I. The Board's findings and conclusions

Briefly, the Board found that the Union violated Section 8 (b) (2) and (1) (A) of the Act by maintaining an unlawful union-security agreement with the Company, and by causing the Company pursuant to this agreement to discriminatorily discharge the charging party, Charles E. Pense. The subsidiary facts upon which the Board based its findings are summarized below.

A. The unlawful union-security agreement between the Union and the Company

On December 16, 1952, the Union and the Company executed a contract which remained in effect until succeeded by a new agreement on February 1, 1954 (R. 31, 35; 144-145, 147-148). Article XIV of the 1952 contract, in part, read as follows (R. 35-36; 144-145):

UNION SECURITY

SECTION 1. Any employee within the bargaining unit who, on the effective date of this

Company has complied with the Board's order insofar as directed against it.

⁴ The Company, a Delaware corporation, manufactures and sells military and commercial aircraft, missiles, and aircraft parts and accessories (R. 33; 7-8, 19-20). The interstate purchases and sales of its Pomona division run into millions of dollars (R. 34-35; 8, 21). No jurisdictional issue is presented.

agreement, is a member of the Union in good standing, and each employee within the bargaining unit who thereafter becomes a member of the Union shall pay while on the Company's active payroll and a member of the Union, initiation fees, monthly dues and general assessments levied by the International Association of Machinists, Guided Missile Lodge No. 1254, in accordance with the constitution and by-laws of the Union as a condition of employment while in the bargaining unit, provided that in no event shall the initiation fee, monthly dues or general assessment exceed the amount specified in the constitution and by-laws; and each employee who, after the effective date of this agreement, is separated from the bargaining unit and who at such time is subject to the provisions of this section shall, upon rehire within the bargaining unit, again pay regular dues to the Union commencing with the date of rehire; provided, further, that any employee may withdraw from membership in the Union by notifying the Union and the Company by registered mail, postmarked between August 1 to August 15 of the then currently effective yearly period.

SECTION 2. No employee, as a condition of employment while in the bargaining unit, shall be required to pay while on the Company's active payroll any Union membership dues, fees or general assessments covering any period during which the employee was not in the bargaining unit or was not on the Company's active payroll.

SECTION 3. Any employee subject to the provisions of Section 1 above, who is thereafter

separated from the bargaining unit, shall upon his reemployment in a job within the bargaining unit again pay membership dues to the Union in accordance with Section 1 above, unless such employee has withdrawn from membership with the Union in accordance with this Article.

In practice, according to the Union (brief in support of exceptions, p. 8),⁵ except in the case of employees permanently terminating their employment with the Company, "In all those situations * * * when, as, and if a person returned to the unit, he was obligated to resume the payment of dues."

B. The Board's conclusions concerning the contract

1. *The membership maintenance clause*

The Board and the Trial Examiner found that Article XIV of the 1952 contract between the Union and the Company was unlawful in that it required any union member separated from the bargaining unit to resume paying membership dues immediately upon reemployment within the bargaining unit, even though his union membership may have been discontinued in the meantime (R. 88-90, 41-46). Stating that such an employee, when reemployed, "stands in the same shoes as one being hired by the Respondent Company for the first time, who has never been a member of the Respondent Union," the Board, in agreement with the Trial Examiner, held that imposing "a contractual obligation upon an employee in that position to pay union dues beginning with the

⁵ A copy of this brief has been lodged with the Clerk of the Court.

commencement of his employment" was violative of the Act (R. 89, 44-45). Accordingly, the Board concluded that the Union, by maintaining in existence this unlawful provision, violated Section 8 (b) (1) (A) and (2) of the Act (R. 90).⁶

2. The assessment provision

Contrary to the Trial Examiner, the Board found that the Union further violated Section 8 (b) (1) (A) of the Act by maintaining in its contract with the Company the provision requiring the payment of general Union assessments, in addition to initiation fees and monthly Union dues, as a condition of employment (R. 90-91).⁷ Since the Act does not authorize discharge for nonpayment of union assessments, the Board concluded that a contractual provision requiring such payments under penalty of discharge acts as restraint upon employees in the exercise of rights guaranteed in Section 7 of the Act (R. 91).

C. The discriminatory discharge of Pense

Charles Pense began work at the Company's Pomona division on January 19, 1953 (R. 46; 117).

⁶ The provision in question was continued in the 1954 contract between the Union and the Company (R. 90; 147-148).

⁷ The Trial Examiner found this provision to be void and illegal but concluded that it was not a basis for an unfair labor practice finding because he concluded that no coercion resulted from the mere inclusion of the provision in the contract. In his opinion, coercion could not occur until an assessment was levied (R. 37-41). The Board agreed with the Trial Examiner that the inclusion of the assessment provision in the contract did not violate Section 8 (b) (2) of the Act because the Union did not attempt to enforce this provision, which was dropped from its 1954 contract with the Company, and because the Union apparently did not intend to utilize it (R. 91-92).

Pense, a member of the Union from October 1952, was automatically dropped from membership for non-payment of dues in December 1953 (R. 46; 117-118, 146). The Union thereafter, on December 8 and 17, 1953, and on January 15, 1954, notified the Company in writing that Pense had been dropped from membership for failure to pay dues and requested the Company "to immediately terminate" his employment "in accordance with the terms of our Agreement" (R. 48-49, 53; 120, 140-143). The Company complied with the Union's request and discharged Pense on January 15, 1954 (R. 53; 117).

D. The Board's conclusions concerning Pense's discharge

The Board found, contrary to the Trial Examiner, that the otherwise valid requirement that members pay dues as a condition of employment was not separable from the unlawful provisions in the contract and hence did not justify the Union in causing the Company to discharge Pense.⁸ As the Board stated (R. 93-94): "All the provisions in question are related in character and are integral parts of the union-security arrangement devised by the respondents. Viewing the union-security section of the contract as a whole, we find that the lawful requirements therein⁹ are so inter-

⁸ The Trial Examiner found that the Union requested Pense's discharge for discriminatory reasons rather than for nonpayment of dues and hence that it violated the Act by causing his discharge (R. 54-61). In view of its holding that no valid union-security clause was available as a defense to Pense's discharge, the Board did not pass upon the validity of the Trial Examiner's pretext finding (R. 94).

⁹ "The requirement for the payment of initiation fees and monthly dues is, of course, a valid one when considered in isolation." [Footnote renumbered.]

woven with the unlawful ones as to be tainted with illegality themselves." The Board concluded, accordingly, that the Union caused Pense's discharge in violation of Section 8 (b) (2) and (1) (A) of the Act (R. 94).

II. The Board's order

The Board ordered the Union to cease and desist from the unfair labor practices found and from in any other manner restraining or coercing employees in the exercise of their rights under Section 8 of the Act. Affirmatively, the Board ordered the Union, jointly and severally with the Company,¹⁰ to make Pense whole for any loss in pay he may have suffered by reason of the discrimination against him; to notify the Company and Pense that it has no objection to his employment and that it would not in the future request the discharge of Pense or any other employee except for nonpayment of dues or initiation fees as permitted under an agreement authorized by Section 8 (a) (3) of the Act; and to post appropriate notices (R. 99-101, 103-104).

ARGUMENT

I. The Board properly found that the Union violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act by maintaining an illegal union-security agreement with the Company

A. The maintenance of membership provision

The evidence summarized above establishes that the Union and the Company in 1952 entered into and thereafter gave effect to, a contractual provision which required, as a condition of employment, that all mem-

¹⁰ As noted above (n. 3, p. 1), the Company has complied with the portion of the Board order directed against it.

bers should continue to pay union dues,¹¹ and that even if transferred out of the unit or leaving the Company's employ, such members, if transferred back or reemployed in the unit, should be liable for union dues from the date of their rehiring or return to the unit, regardless of whether they had resigned from or been dropped from the Union in the meantime. As noted above, the Board found that this provision, in effect a maintenance of membership requirement, exceeded the limits of union security permitted by the Act. This finding, as we shall demonstrate, was wholly proper.

Section 7 of the Act guarantees to employees the right, among others, to refrain from joining a union except to the extent that such right may be affected by an agreement requiring membership in a union as authorized in Section 8 (a) (3) of the Act. This right is protected from infringement both by employers and by labor organizations. Section 8 (a) (3) enjoins employers from discriminating against employees with respect to hire or terms or conditions of employment to encourage or discourage membership in any labor organization. Section 8 (b) (2) prohibits labor organizations from causing or attempting to cause employers to discriminate against employees in violation of Section 8 (a) (3). Section 8 (b) (1) (A) also forbids labor organizations from restraining or coercing employees in the exercise of the rights guaranteed in Section 7.

¹¹ With the exception of a 15-day escape period between August 1 and August 15.

The sole exception to the protection thus accorded to employees to refrain from becoming or remaining members of labor organizations is contained in the provisos to Section 8 (a) (3). The first proviso, which is the only one involved in this case, permits an employer to make an agreement with the bargaining representative of his employees which "requires as a condition of employment membership [in the union] on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later * * *." Maintenance of membership agreements, i. e., agreements requiring all present union members and all other employees thereafter voluntarily joining the union to maintain their union membership during the life of the contract, have long been recognized as a lesser form of union security which is permissible under the proviso to Section 8 (a) (3). See *Public Service Company of Colorado*, 89 N. L. R. B. 418, 419-423; *Charles A. Krause Milling Co.*, 97 N. L. R. B. 536, 542, n. 18; *Utility Co-Workers Association*, 108 N. L. R. B. 849; *Communications Workers of America, CIO v. N. L. R.*, 215 F. 2d 835, 836.

Under the maintenance of membership agreement executed by the Union, however, it was stipulated that "each employee who, after the effective date of this agreement, is separated from the bargaining unit and who at such time is subject to the provisions of this section shall, upon rehire within the bargaining unit, again pay regular dues to the Union commencing with the date of rehire." [Emphasis supplied.]

This requirement, that employees pay dues immediately upon reemployment even though they may have relinquished, or been dropped from, union membership while out of the unit and therefore outside the coverage of the agreement, went beyond the permissive language of the first proviso to Section 8 (a) (3). It required the payment of union dues by employees whose union membership had been validly terminated while out of the unit, or out of the Company's employ, and who therefore were under no obligation to resume paying union dues. Even if the clause in question were to be construed as requiring all union members covered by it to rejoin the Union upon returning to the unit, i. e., assuming that the parties intended it to be a strict union security clause insofar as they were concerned, the clause nevertheless exceeds permissible bounds in that it fails to allow the former members thirty days in which to rejoin, as required by the first proviso to Section 8 (a) (3).

Before the Board the Union argued, first, that the provision in question was never intended to apply to employees permanently quitting the Company's employ and that it should not be regarded as requiring employees who completely severed their employment relationship with the Company immediately to start paying dues upon being rehired in the unit. Secondly, the Union urged that as to other employees who left the unit for one reason or another, such as a leave of absence, a lay-off, or a transfer to work outside the unit, their rights and obligations of membership were merely temporarily suspended during their

separation from the bargaining unit, and that such employees, if they had not resigned their union membership during the August 1–August 15 period provided in the agreement, could validly be required to resume payment of dues from the date of their return to the unit.

In making the first argument the Union tacitly recognizes that if the agreement has the scope found by the Board, i. e., requires persons leaving the Company's employ to start paying dues immediately upon being rehired by the Company, it is not sanctioned by the Act. That the agreement has such scope is apparent from the language of the agreement itself. Thus, it specifically provides that "each employee who * * * shall, upon rehire within the bargaining unit, again pay regular dues to the Union commencing with the date of rehire." This language is unambiguous, and covers employees permanently quitting the Company's employ as well as employees temporarily separated from the unit for other reasons. The agreement, therefore, is not open to the interpretation urged by the Union, and it cannot be defended on this ground. And even if the agreement were not so clear on its face, since the Union is seeking to justify it under an exception to the general prohibition of the Act against employer discrimination, any doubt must be resolved against the Union. As is well recognized, "one seeking to come within the exception must clearly comply with its terms." *N. L. R. B. v. Don Juan, Inc.*, 178 F. 2d 625, 627 (C. A. 2); *N. L. R. B. v. Radio Officers Union*, 196 F. 2d 960,

964 (C. A. 2), affirmed, 347 U. S. 17; cf. *N. L. R. B. v. Mason Mfg. Co.*, 126 F. 2d 810, 813 (C. A. 9).

The Union's further argument that it could validly require all employees except those permanently severing their employment relationship with the Company to resume payment of dues immediately upon resuming active status in the unit, assumes that such employees, for example, one who had transferred to another plant, somehow became disabled from terminating their membership in the Union through normal union procedures. There is no basis for this assumption. These employees, no less than employees permanently severing their connection with the Company, were entitled, once they were no longer in the unit covered by the contract, to resign or be dropped from the Union.

The Union in effect contends that the rights and obligations of these employees were merely temporarily suspended by the separation from the unit, and that if they had not resigned from the Union during the August 1-August 15 period provided in the contract, they could be required to pay dues from the day of their return to the unit. This contention wholly overlooks the fact that the statutory representative of employees can bind his constituent employees only so long as they remain his constituent employees. Hence, the Union could not, consistently with the policies of the Act, bind the employees here in question to retain their union membership at a time when they were not covered by the contract. As pointed out by the Board and the Trial Examiner (R. 89, 44), an employee, once out of the unit, is not

covered by the contract and may drop his Union membership without regard to the restrictions in the contract. An employee who has done so, in the words of the Board, "stands in the same shoes as one being hired by the Respondent Company for the first time, who has never been a member of the Respondent Union" (R. 89). It is undisputed that the 1952 contract could not be validly applied to require such an employee to pay union dues from the start of his employment.

B. The payment of assessments provision

Section 8 (b) (2) specifically provides that it shall be an unfair labor practice for a labor organization to cause or attempt to cause an employer "to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." As the Supreme Court has stated, "the policy of the Act is to insulate employees' jobs from their organizational rights" and "to prevent utilization of union-security agreements except to compel payment of dues and initiation fees". *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, 40-41.

As shown above, the union-security provision here involved expressly required Union members to pay "general assessments levied by the [Union] * * * as a condition of employment while in the bargaining unit." This requirement that members pay, as a condition of employment, general assessments, in addition to initiation fees and monthly union dues, went

beyond the permissive limits of Sections 8 (a) (3) and 8 (b) (2). The Board has repeatedly held that assessments are not "periodic dues" within the meaning of Section 8 (b) (2) and Section 8 (a) (3). *International Harvester Co.*, 95 N. L. R. B. 730; *Lever Bros.*, 97 N. L. R. B. 1240; *Continental Can Co.*, 98 N. L. R. B. 1252; *National Malleable and Steel Castings Co.*, 99 N. L. R. B. 737; *John Deere Planter Works of Deere and Co.*, 107 N. L. R. B. 1497. That it was a purpose of Congress in limiting the scope of permissible union-security agreements to free the right of employment from the payment of union assessments is clear from the legislative history of the 1947 Amendments. See *International Harvester Co.*, 95 N. L. R. B. at 732-833.

The Union's conduct in continuing in effect this illegal requirement, even apart from any attempt at actual enforcement of the unlawful provisions, constituted a violation of Section 8 (b) (1) (A). As the Court of Appeals for the Second Circuit stated in a similar situation (*N. L. R. B. v. Red Star Express*, 196 F. 2d 78, 81):

The execution of a contract containing a forbidden union-security clause constitutes an unfair labor practice [prohibited by Section 8 (b) (2) and 8 (b) (1) (A)]. This is so because the existence of such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge if he defies the contract by refusing to become a member of the Union. It is no answer to say that the Act gives him a remedy in the event that he is discharged.

The Act requires that the employee shall have freedom of choice, and any form of interference with that choice is forbidden.

See also *N. L. R. B. v. Waterfront Employers of Washington*, 211 F. 2d 946, 951 (C. A. 9); *N. L. R. B. v. F. H. McGraw and Co.*, 206 F. 2d 635, 641 (C. A. 6). Cf. *N. L. R. B. v. Gottfried Baking Co.*, 210 F. 2d 772, 779-780 (C. A. 2).

In its brief to the Trial Examiner, the Union urged that the mere inclusion in the agreement of the provision for the payment of assessments as a condition of employment was not by itself a violation of the Act, that there had to be some implementation of the provision, by the levying of an assessment, for example, before restraint or coercion of employees could occur. The Union asserts that no such collection of assessments was ever made under the agreement. However, this argument ignores the rights of employees under Section 7 of the Act to be free from potential as well as immediate restraints upon the exercise of the right to refrain from union activities. As shown above, a union-security provision requiring union membership contrary to the terms of the proviso to Section 8 (a) (3) is violative of Section 8 (b) (1) (A), even if not enforced, because the threat inherent in its mere existence may be carried out at any time and coerce an employee to join the union rather than to risk discharge. An assessment provision poses a similar threat and in the same way may coerce an employee into paying the assessment rather than to risk discharge. For these reasons the

Board properly rejected the Trial Examiner's finding to the contrary.

II. The Board properly found that the Union violated Section 8 (b) (2) and 8 (b) (1) (A) by causing Pense's discharge under an illegal union-security agreement

As stated above, Pense was dropped from membership in the Union in December 1953 for non-payment of dues. The Union thereafter on three occasions formally requested that Pense be terminated for non-payment of dues in accordance with the union-security provisions of the agreement. On January 15, 1954, the Company discharged Pense in compliance with these requests. As shown in Point I above, the agreement pursuant to which Pense was discharged exceeded the limits of permissible union security both with respect to the maintenance of membership provision and also with regard to the assessment provision. The agreement, being invalid, affords no defense to discrimination based on union membership or the lack of it. Hence by invoking the agreement against Pense and causing the Company to discharge him for failing to pay dues, the Union further violated Section 8 (b) (2) and 8 (b) (1) (A). *N. L. R. B. v. United Hoisting Co. et al.*, 198 F. 2d 465 (C. A. 3); *Red Star* case, *supra*.

The Union argued that the provision in the 1952 agreement for the payment of initiation fees and monthly dues was severable from the unlawful maintenance of membership and assessment provisions, and hence that it was properly invoked against Pense. However, examination of the union-security provision shows that the unlawful assessment provision is in-

cluded in the same phrase as the provision for the payment of fees and dues and is given precisely the same emphasis. Thus, any employee who decides to join the Union must thereafter maintain membership in good standing by paying "initiation fees, monthly dues and general assessments levied by the [Union]." This requirement is immediately followed by the illegal maintenance-of-membership provision which deprives former members of their statutory right, upon reemployment, to refrain from rejoining the Union. The Union did not regard the illegal dues provision as of minor significance. In practice it did not differentiate between the lawful and unlawful provisions in the contract concerning the payment of dues. By its own admission, all former Union members except those who had completely severed their employment with the Company were required to pay dues from the beginning of their reemployment. Before the Board the Union vigorously defended its right to impose such a requirement, asserting that the Trial Examiner's finding of illegality, if adopted, would "destroy the effectiveness of all Maintenance of Membership clauses" (Brief in support of exceptions, p. 7).¹² Significantly, the illegal dues provision was carried over to the 1954 contract executed by the Union and the Company (*supra*, n. 6, p. 5).

The foregoing, we submit, fully supports the Board's finding, contrary to the Trial Examiner, that (R. 93):

All the provisions in question are related in character and are integral parts of the union-

¹² As noted above, a copy of this brief has been lodged with the Clerk of the Court.

security arrangements devised by the respondents. Viewing the union-security section of the contract as a whole, we find that the lawful requirements therein are so interwoven with the unlawful ones as to be tainted with illegality themselves. For this reason, we find that no valid security clause is available as a defense to the discharge of Pense [footnotes omitted].

See *N. L. R. B. v. Rockaway News Supply Company*, 345 U. S. 71, where the Supreme Court, in holding that an invalid union-security clause did not necessarily invalidate an entire contract, stated that "a forbidden provision [may be] so basic to the whole scheme of a contract and so interwoven with all its terms that it must stand or fall as an entirety" (345 U. S. at 78).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the order in full.

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JULY 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to

require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made: * * * *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the

initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order

was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 15099

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED MISSILE
LODGE 1254, *Respondent*

On Petition For Enforcement Of An Order Of The National
Labor Relations Board

BRIEF FOR THE RESPONDENT, INTERNATIONAL
ASSOCIATION OF MACHINISTS, GUIDED MISSILE
LODGE 1254

FILE

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**BRIEF FOR THE RESPONDENT, INTERNATIONAL
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LODGE 1254**

JURISDICTION

This case is before the Court upon a petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*),¹ for enforcement of against Respondent Union, following proceedings under its order (R. 99-101, 103-104)² issued on March 22, 1955,

¹ The pertinent provisions of the Act are appended hereto (pp. 13-16, *infra*).

² References to the printed record and proceedings are designated and preceded by "R".

Section 10 of the Act. Respondent in resisting the Board's Order and Petition for Enforcement denies that it has committed unfair labor practices as alleged and found. (Respondent's Answer R. 110-112).

Respondent concedes that this Court has jurisdiction of this proceeding, the alleged unfair labor practice having occurred at Pomona, California, within this judicial circuit.

The Board's Decision and Order is reported at 111 N.L.R.B. 1055.

STATEMENT OF THE CASE

The facts set forth in the Board's Statement of the Case are substantially accurate. The Board, however, (quite properly from its point of view) has emphasized certain aspects of the case and under-emphasized others. We believe, therefore, that it may be useful to attempt to correct the error and to balance the facts by pointing up certain elements in the procedural and factual situation.

PRELIMINARY STATEMENT

The Board's brief reflects that it has "lodged with the Clerk of the Court" a copy of Respondent's Brief in Support of Exceptions which had been filed during the course of the administrative proceedings.³ In addition, the Board's brief refers to and relies upon arguments and statements contained in that brief—in fact the document is intertwined and interwoven with such references.⁴ However, such "lodging", reference, and arguments, are, in the opinion of the undersigned, improperly before the Court for several reasons: first, the Respondent's brief before the administrative agency was not under Rule 17 of this Court designated as part of the "Transcript of Record"; second, the Respondent, until it had received

³ Board's brief p. 4, fn. 5; p. 17, fn. 12.

⁴ Board's brief pp. 4, 10, 11, 12, 15, 16 and 17.

the Board's brief, had no knowledge that the Board had "lodged" the "brief" with the Clerk of Court nor that it was to be bound by the gratuitous statements and arguments it contained; third, the references and arguments to that brief are speculative, in any event, and are not germane to the issues presented; and, fourth, the case is now before the Court in a different posture than that before the administrative tribunal. For these reasons, we respectfully move the Court in conformity with its Rule (17) to ignore all references and arguments relating to the Respondent's prior brief before the Board, and referred to in the Board's brief at pages 4, 10, 11, 12, 15, 16 and 17.

THE DISCHARGE OF PENSE

Charles Pense, an employee of the Company within the bargaining unit, at all times material, was discharged at the request of the Union on January 15, 1954 for failure to maintain membership in the Union as required by a "maintenance of membership" provision in the then existing collective bargaining agreement. (R. 35-36; 46; 48-49; 53; 117-118; 120; 140-143; 144-145; 146).

Briefly, the union security provision required, as a condition of employment (1) that all employees who are or become members of the union pay initiation fees, monthly dues and assessments; (2) that employee-members of the union separated from the unit shall upon rehire again "pay regular dues", but not while outside the scope of the bargaining unit; and (3) that employee-members of the bargaining unit when separated, upon "reemployment" in jobs within the bargaining unit shall again pay membership dues in accordance with (1) above.⁵ (R. 144-145)

Following Pense's discharge the Board issued its complaint alleging that the union violated Sections 8(b)(1)(A)

⁵ The text of the "maintenance of membership" clause appears in the Board's statement of the case, as well as at page 144 of the Transcript of Record.

and (2) of the Act because the union security clause in question was illegal. (R. 7-15) The Respondent, in its answer, admitted it caused the discharge of Pense in accordance with the terms of the contract but denied violations of the statute, affirmatively pleading that such discharge was in accordance with the terms of "a valid and legal agreement" and that "all acts by either the Company or the Union in connection with the termination of Pense was proper and legal in all respects." (sic) (R. 17-18)

After a hearing on the matter, the Board issued its Decision and Order finding that the union security provisions were "unlawful" and that the Union violated 8(b)(1)(A) and (2) of the Act for the reason that the "lawful requirements therein—[the payment of initiation fees and monthly dues]⁶ are so interwoven with the unlawful ones—[the requirement for the payment of assessments, and the failure to grant the 30-day grace period]—as to be tainted with illegality"; and for this reason "no valid union-security clause is available as a defense to the discharge of Pense".⁷ (R. 93-94)

It then issued its Remedy and Order requiring the Respondent to take certain affirmative and negative action. (R. 94-107)

ARGUMENT

I. The Discharge of Pense was Caused by the Union in Accordance with the "Valid" Union-Security Requirements of the Agreement Even Assuming Arguendo that Some Portions of the Union-Security Provisions were "Invalid".

The record is undisputed that at all times material to his discharge, Pense was a member of the bargaining unit who as a condition of continued employment was required

⁶ The Board in its Decision concedes that "the requirement for the payment of initiation fees and monthly dues is, of course, a *valid one when considered in isolation*". (R. 94, fn. 10) (Emphasis ours)

⁷ The Board, in its Decision and Order and its Petition for Enforcement did not decide or adopt the other conclusions of the Trial Examiner relating to Respondent's motive for requesting Penses' discharge. (R. 94, note 10)

to pay dues according to the terms of the contract. Pense, at his own election, chose to stop paying dues in accordance with the contract's requirements and accordingly was, at the Union's request, discharged by the Company. The Board in discussing the contract's union security provisions concluded that the "lawful requirements therein [were] so *interwoven* with the unlawful ones as to be tainted with illegality themselves". A phrase we believe to have been adopted from dicta in the late Justice Jackson's opinion in *N.L.R.B. v. Rockaway News Supply Company*, 345 U.S. 71, 78, wherein speaking for the Court he said:

"We do not, of course, question that there may be cases where a forbidden provision is so basic to the whole scheme of a contract and so *interwoven* with all its terms that it must stand or fall as an entirety." (Emphasis ours)

Without in any way conceding that the contract in any form was invalid, the question thus presented is whether the contract and its union security provisions was so interwoven with illegality that all its terms stand or fall as an entirety. If not, the defense that the discharge was pursuant to a valid union security provision was available to the Respondent, and the enforcement of the Board's Order must be denied, as to any alleged violation of the Act.

We believe that the decision itself negates this finding and conclusion in several respects:

(1) The Board's Decision states (R. p. 89):

"The union security provisions of the contract . . . is the maintenance of membership variety, . . . [requiring] an employee who is separated from the bargaining unit covered by the contract, at a time when he is a member of the Respondent Union, to resume paying membership dues immediately upon his reemployment within the bargaining unit."

Assuming, *arguendo*, that this clause is not in accord with Section 8(a)(3) of the statute because it did not grant to employees a 30-day grace period, and further, assuming *arguendo* that it is, as the Board found, an "illegal" provision, Pense, at no time, and the record is devoid of evidence to the contrary, was either compelled or coerced or required to abide by that provision in the contract and to this extent, the question of Penses' discharge did not fall within the proscription of 8(a)(3) or (1) of the Act unless such clauses are *per se* violations of the Act. *Contra: Charles A. Krause Milling Company*, 97 N.L.R.B. 536. Indeed he was not discharged for failing to "resume paying membership dues immediately upon reemployment in the bargaining unit". He had never been outside the bargaining unit. In fact, at all times material, Pense was a voluntary member of the Union who elected at his own choice to stop paying dues. Accordingly, neither the statute nor Board policy requires that as a matter of right a member of the union or an employee under all circumstances must have spelled out in a contract as a protection of his rights under Section 7 of the Act the 30 day grace period. See *A. Sandler Co.*, 110 N.L.R.B. 738; *Milwaukee Gas Light Co.*, 111 N.L.R.B. 837. It would appear from the foregoing cases, that the Board would now apply different standards of interpretation and application to contracts under Section 8 than it does to contracts under Section 9 of the Act, even though the permissive language of Section 8 relating to union security clauses, directly controls and applies to such provisions, and its effect on rights of employees under Section 7 of the Act, whether the question relates to contract bar issues in questions concerning representation under Section 9 or unfair labor practices relating to Section 8. This inconsistency in policy affords no guide either to employees, unions, or employers, who attempt to conform their valid rights under the Act to the Board's ever changing whims, interpretation of the statute, and natural inclination to police labor contracts. In the face of such inconsistency, we often wonder what the Board would do

if it were ever faced with the problem of day-to-day collective bargaining?

Plainly speaking, Sections 8(a)(3), 8(b)(2) and 8(b)(1)(A) forbid discrimination against employees *except* where there is in effect a union security contract. The unlawful discrimination, if any occurs *when* an employee's *employment* is affected because of the *failure* of the Employer and the union to accord to the employee the 30 day period within which to join or refrain from joining the union, or where the employee is encouraged or discouraged in membership in a labor organization but not because the language of the contract fails to grant this right. (*A. Sandler Co.*, 110 N.L.R.B. 738; *Milwaukee Gas Light Co.*, 111 N.L.R.B. 837; affirming *Charles A. Krause Milling Co.*, 97 N.L.R.B. 536.)

In the case at bar, Pense was a member of the union prior to and during most of the time of his employment. He was not required *to join* the union under the terms of the contract—the contract being as found by the Board a “maintenance of membership” variety. For this reason, it follows, under well established Board doctrine that the contract did not have to grant to him the 30 day period under the statute. *A. Sandler Co.*, 110 N.L.R.B. 738; *Milwaukee Gas Light Co.*, 111 N.L.R.B. 837 (affirming *Charles A. Krause Milling Company*, 97 N.L.R.B. 536). For example, in *Charles A. Krause Milling Company*, 97 N.L.R.B. 536, the leading case on the subject, the Board in discussing the 30 day grace period in Section 8(a)(3) of the Statute said:

... we are mindful of the fact that the union-security clause in that case provided for maintenance of membership, a lesser form of union-security than the union shop. It is clear that under such a clause, as under a union-shop provision, *a grace period need not be accorded to an old employee who already was a member of the union on the effective date of the contract.* (emphasis ours)

The Board's dicta in its decision that a member of the union stands in the same shoes as a new employee when reemployed is not germane to the issue here, and for purposes of this case is conjecture and speculation based on nothing that the record facts support or that even remotely relate to Pense's discharge. In short, the finding speculates and conjectures as to what Pense's status is or would have been, or what the union would have done had Pense been reemployed or rehired, and, is something that need not be decided here.

(2) The Board also found that the mere inclusion in the contract of a requirement calling for the payment of "assessments" exceeded the "permissive" language of Sections 8(a)(3) and acted as a "restraint upon employees desiring to refrain from union activities within the meaning of Section 7 of the Act."⁸ It then went on to find that such a requirement was in violation of 8(a)(1) and 8(b)(1)(A) of the Act—but, because this requirement in the contract was not "enforced", it did not violate other provisions of the Act; i.e., Sections 8(a)(3) or 8(b)(2). (R. 89-92) Here again, the Board in its discussion selected and separated the so-called "illegal" provisions of the agreement from the "legal" provisions requiring the payment of dues as a condition of employment. It did so when it conceded that "the requirement of the payment of initiation fees and monthly dues is, of course, a valid one when considered in isolation". (R. 94, fn. 10) Yet while it could so separate the clauses for discussion of the case, it should be noted that it could not so do for purposes of its ultimate findings and conclusions. Be that as it may, Pense was not discharged for his failure to pay "assessments", and so the Respondent while found guilty of 8(b)(1)(A) of the Statute, was found not guilty of violating other provisions of the Act. We submit that Pense was discharged for his failure to pay "dues" in accordance with the terms of the

⁸ This defect, if any, was cured in the 1954 contract. (R. 96, note 16)

contract and for no other reason. A reason permitted under the Act. Senator Taft, one of the co-founders of the Act, at page 20 of the Report (Senate Report 105, 80th Congress, 1st Session (1947)) accompanying S-1126 which was without substantial change, adopted in the present Act, stated with respect to Sections 8(a)(3) and 8(b)(2):⁹

Section 8(a)(3): . . . The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the committee did wish to protect the employee in his job if unreasonably expelled or denied membership. The tests provided by the amendment are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union.

* * *

Section 8(b)(2): This is designed to protect individual employees from discrimination in employment induced by a labor organization which has a union-shop contract with an employer, entered into pursuant to the provisions of section 9(e) and in compliance with the conditions in section 8(a)(3). The labor organization may not persuade or attempt to persuade the employer to discriminate against an employee except for two reasons: First, that the employee has lost his union membership by failing to tender the dues or initiation fees uniformly required as a condition of membership; second, that the employee, at a time when the Board would not entertain a petition to determine representation pursuant to section 9(c)(1)(A), has engaged in activity on behalf of another labor organization or in activity having as its objective the termination of the exclusive representative status of the union. *It is to be observed that unions are free to adopt whatever membership provisions they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee except*

⁹ Senate Committee on Labor and Public Welfare, Miscellaneous Hearings, Reports, etc., 1947-1948, Vol. 2, Senate Report 105, pages 20, 21, 80th Cong., 1st Sess. (1947).

in the two situations described. Thus, an employee, even though he loses his union membership for reasons other than those set forth, may not be deprived of his job because of a contract requiring membership as a condition of employment. (Emphasis supplied)

From the foregoing, it is clear that unless the *discharge* was for any reason *other* than Pense's failure to tender periodic dues and initiation fees it was a violation of 8(a)(3) and (b)(2) of the statute. It also follows that because the discharge was for non-payment of dues, the affirmative defense was available to the Respondent, and, that the discharge was not in violation of the statute.

II. The Board's Order Should Not be Enforced Because it Requires of the Respondent Nothing More Than What it Did—Namely Not to "Request the Discharge of Said Pense or any Other Employee for a Reason Other Than a Failure to Tender Dues . . ."

In its Order (R. 100) at paragraph (2), the Board requires the Union to

"Notify the Respondent Company and Charles E. Pense, in writing that it has no objection to the employment of Pense and that it will not in the future request *the discharge* of said Pense or any other employee for a reason other than a failure to tender monthly union dues or initiation fees uniformly required to acquire or maintain membership in the Respondent Union as a condition of employment, under an agreement authorized by Section 8(a)(3)." (emphasis ours)

Undisputed is the evidence relating to the reason for Pense's discharge. Remaining however for consideration is the question—are these various clauses illegal *per se* under Section 8(a)(3) of the Act, and if so, what effect, if any, did the so-called "illegal" provisions have on Pense's

discharge. We say that they are not *illegal per se* nor did they affect Pense's discharge. *cf. A. Sandler Co.*, 110 N.L.R.B. 738; *Milwaukee Gas Light Co.*, 111 N.L.R.B. 837; *Rockaway News Supply Co.*, 345 U. S. 76. Because at no time was the discharge caused pursuant to these so-called "illegal" provisions. As the Supreme Court said in *Rockaway News Supply Co.*, 345 U. S. 76-77:

"There are two obstacles in the way of the Board's complete disregard of this contract. The first is that, even if inclusion of a forbidden provision is enough to justify the Board in setting it aside as to the future, it does not follow that it can be wholly ignored in judging events that occurred before it was set aside. It is one thing for the Board to say that the parties should not go on under such a contract; it is another to say that no effect whatever may be given to a contract negotiated in good faith by the union and the employer which both believed to be valid and operative, to which both were conforming their conduct, and which no authority had yet held void."

Accord, *N.L.R.B. v. United Electrical, Radio, and Machine Workers of America, Local 622 (UE)*, 203 F. 2d 673 (C. A. 3) in which the Court, in denying the Board's petition for enforcement, said concerning the failure of the parties to provide the 30-day grace period in the contract insofar as it affected new employees:¹⁰

"We cannot accede to the Board's contention. In our view the statutory requirement for the minimum joining period of 30 days following the effective date of a union-security agreement is but a temporary transitional provision which, although it must, of course, be read into every such agreement, need not necessarily be expressly included on pain of invalidating the entire union-security provision. *Collective bargaining agreements are not to be so strictly and technically construed.* National Labor Relations Board

¹⁰ We submit that this conclusion in the Court's decision is equally true with respect to briefs submitted to the Board by "laymen unschooled in the niceties of legal draftsmanship."

v. Rockaway News Supply Co., 1953, 345 U. S. 71, 73 S. Ct. 519. *They are practical working arrangements frequently drawn by laymen unschooled in the niceties of legal draftsmanship.* Where, as here, such a contract exhibits substantial compliance with the statute we cannot hold the union-security clause to be void. We conclude that the Board erred in doing so and thereupon in holding that Gozdick's discharge was unlawful." (emphasis ours)

Relying as we must upon the Supreme Court's holding in *N.L.R.B. v. Rockaway News Supply Co.* (*supra*), as well as prior Board and Court decisions, the mere failure to include within the body of an agreement a "30-day grace" period or the inclusion in the contract of the requirement of the payment of assessments did not justify the Board's broad finding that the union security clause was not available as a defense to Pense's discharge. We contend that the defense that the discharge was not in violation of the statute was available to the Respondent; that no substantial evidence supports the Board's finding of unfair labor practices; that the Union was entitled to seek as it did Pense's discharge for nonpayment of dues; and, that Pense should be neither reinstated nor reimbursed according to the Board's Order. As the Court correctly concluded in *Rockaway News*, "Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law". *N.L.R.B. v. Rockaway News Supply Co.*, (345 U. S. 71, 75)

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's Petition For Enforcement of its Order should be denied.

PLATO E. PAPPS
Chief Counsel

INTERNATIONAL ASSOCIATION OF MACHINISTS,
AFL-CIO

August 23, 1956

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made: * * * *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has rea-

sonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

REPRESENTATIVES AND ELECTIONS

“SEC. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * *

(e) (1) Upon the filing with the Board by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a peti-

tion alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means or adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of act and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or re-

straining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

No. 15099.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED
MISSILE LODGE 1254,

Respondent.

On Petition for Enforcement of an Order of the National
Labor Relations Board.

Brief for International Union, United Automobile,
Aircraft and Agricultural Implement Workers of
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The Interest of Amicus Curiae.

The International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW), views with concern the Decision and Order of the NLRB in this matter. UAW's interest is twofold.

First, your *amicus* is a union which is the collective bargaining representative for 1,500,000 employees in the automobile, aircraft and agricultural implement industries. The Board's decision will affect many, if not all, of its approximately 2,000 collective bargaining agreements which contain union security clauses for the protection of its members.

Second, the scope of the Board's Decision and Order and the blanket proscription of certain applications of union security clauses, as requested by the Board's General Counsel in his brief to this Court will cast a cloud of illegality upon many union security agreements and practices now in effect between the UAW and employers throughout the country.

ARGUMENT.

I.

Introduction.

As *amicus curiae*, we are not primarily arguing the question of the propriety of the Board's Order as it concerns the discharge of Charles E. Pense. Unfortunately, not content with a determination of this issue, the General Counsel, in his brief, has made a broad attack on union security clauses and requested an Order and Decree for enforcement by this Court which would nullify rights and obligations of other employees under all union security clauses in factual situations entirely different from that of Pense. It will be recalled that Pense was neither a laid off employee, nor an employee on leave-of-absence, nor a transferred employee. Yet a broad decree relating to the operation of union security clauses in all these situations is requested by the General Counsel, although clearly the record contains no evidence concerning the employer-employee relationship or the status of employees who returned from layoff or from a leave-of-absence, or who return to the bargaining unit following a transfer.

The Board, in this case, had occasion to review the validity of a so-called maintenance of membership clause. The purpose of such a clause is to place an obligation

on employees who are members on the effective date of the agreement or who voluntarily joined the union thereafter, to maintain union membership for the duration of the contract. The clause involved in this case, in addition, obliged employees who were separated from the bargaining unit and were at the time of such separation subject to the provisions of the clause, to commence dues payment to the union immediately upon their "*rehire*." As to the wording of this clause, the Board found that an employee, on his return to the unit, might be required to rejoin the union immediately even though he had in the meantime resigned his membership. The Board held this to do violence to the statutory requirement that employees must be given at least thirty days following *employment* to join the union. Even if this holding is correct it should clearly be limited to employees who have severed their employer-employee relationship. The Board, however, in ruling on the meaning and scope of the union security clause did so on a scanty record which was only concerned with the discharge of Charles Pense. Inasmuch as the latter had not, so far as this record reveals, been separated from the bargaining unit at any time, there was no evidence which in any way related to the complexities created by various forms of separation from the bargaining unit without the severance of the employment relationship. The discharged employee, or the one who has quit, and then is rehired, is in one situation. As to him, the ruling may have merit. Upon "reemployment" such an employee is "rehired" in accordance with the literal and common sense meaning of the words. But the employee on layoff, or on a leave-of-absence, who maintains his connection with the bargaining unit and preserves seniority and other rights under the collective bargaining

contract, and then returns, clearly presents a totally different case. Yet the Board's carelessly written decision beclouds this otherwise obvious distinction. That this is so is betrayed by the fact that the Board's General Counsel in his brief to this Court fails to draw this line.¹

In consequence, we respectfully urge this Court in its decision to clarify the area of confusion created by the wholly unrealistic and artificial construction of union security clauses resulting from the Decision and Order below. We believe that the decree requested from this Court by NLRB will have a most adverse effect on employer-union relations and would deny unions the right to enforce union security agreements with respect to persons who retain their employee status intact on layoff, a leave-of-absence, or while working for the employer outside the bargaining unit—but who retain the right to return to the bargaining unit and other rights under the collective bargaining agreement.

¹The Board in its Decision spoke as follows concerning this question:

“The union-security provisions of the contract relied upon here, which is of the maintenance-of-membership variety, are fully set forth in the Intermediate Report. In brief, they require an employee who is separated from the bargaining unit covered by the contract, at a time when he is a member of the Respondent Union, to resume paying membership dues immediately upon his reemployment within the bargaining unit. Thus, an employee who quits his employment or is transferred from the bargaining unit while a member of the Respondent Union must, as a condition of reemployment in any capacity within the unit, resume paying union dues even though he has resigned his union membership in the meantime, a period during which he could not, as an employee outside the bargaining unit covered by the contract, legally have been required by the contract to maintain his union membership. We share the Trial Examiner's opinion that for purposes of this case such an employee, upon the occasion of his reemployment, stands in the same shoes as one being hired by the Respondent Company for the first time, who has never been a member of

An additional difficulty with the Board's position is that its interpretation will affect not only maintenance of membership clauses but will carry over into cases where there is a full union shop. If the employee who is laid off and then recalled is to be treated as a new hire he too would have to be given the statutory rights of a *new* employee, *i.e.*, thirty days or more before he could be compelled to rejoin the union and pay dues. Clearly, such an unreasonable and unrealistic construction should not be foisted upon union shop clauses.

This Court should resolve the doubt which now arises and plainly indicate that the employee who returns to the bargaining unit after a layoff, leave-of-absence, or other separation during which he maintained seniority and other contract rights and is connected otherwise with the bargaining unit, is not entitled to the thirty day grace period accorded to *new* employees by the statute.

the Respondent Union, and that the existence of a contractual obligation upon an employee in that position to pay union dues beginning with the commencement of his employment would be plainly violative of the Act. While the evidence does not indicate whether the Respondents enforced the provisions in question in an unlawful manner, the Respondent Union concedes in its brief that 'In all situations except a quit, when, as and if a person returned to the unit, he was obligated to resume the payment of dues'

This language is stretched by the General Counsel on page 12 of his brief as follows:

"The Union's further argument that it could validly require all employees except those permanently severing their employment relationship with the Company to resume payment of dues immediately upon resuming active status in the unit, assumes that such employees, for example, one who had transferred to another plant, somehow became disabled from terminating their membership in the Union through normal union procedures. There is no basis for this assumption. These employees, no less than employees permanently severing their connection with the Company, were entitled, once they were no longer in the unit covered by the contract, to resign or be dropped from the Union."

II.

The Board's Unrealistic Interpretation of Union Security Clauses in This Case Does Violence to the Statutory Language and Congressional Intent.

In amending the union security proviso contained in Section 8(3) of the Wagner Act, Congress was primarily concerned with the alleged evils claimed to be inherent in the so-called "closed shop," which required job applicants to be members of the union *before* being hired or required new employees to join the union immediately in order to secure work. As an alleged remedial measure one of the Taft-Hartley amendments was added to the union security proviso (of Sec. 8(a)(3)). This amendment permits the requirement of union membership "on or after the thirtieth day following the beginning of . . . employment." It is certainly stretching a point to claim that the seniority employee who is laid off, or takes a leave-of-absence, on his return "begins" employment in the same way as does the *new hire*. It is the latter whom the statute was intended to protect.² Yet it is precisely this distinction which the Board is beclouding in this case.

Thus the interpretation of the union security clause in the instant case by NLRB is contrary to the legislative history of the Taft-Hartley Act. The Board has construed the union security clause in such a way as to

²See *Legislative History of the Labor-Management Relations Act*, 1947, Volume 1, p. 426:

"Section 8(a)(3): The proviso to this section has been redrafted to abolish what is narrowly termed the 'closed shop'. An employer is permitted to make agreements requiring membership in a union as a condition of employment applicable to employees in a given bargaining unit 30 days after an employee is hired"

nullify and confuse the administration of all union security clauses. Such a construction is clearly neither required nor permissible, being unjustifiably harsh and technical and at variance with orderly and well-established and understood practices. Apparently in the instant case the Board has misconceived the Congressional intent and conceived its statutory duty to be one of preventing unions and employers from effectuating any union security arrangement and in accomplishing this purpose as stated in its brief, at page 11, the Board is intent to resolve all doubts against the union.

However, even the Taft-Hartley proponents, including Senator Taft himself, wished to aid the unions in their struggles against "free-riders." As Senator Taft stated on April 23, 1947, 93 Cong. Rec. 3953: "In other words, what we do in effect is to say that no one can get a free ride in such a shop." See Sen. Rep. No. 105 on S. 1124, 80th Cong., 1st Sess., 1 Legislative History of the Labor Management Relations Act, 1947, 413 (1948), and remarks of Senator Taft, 2 Legislative History 1010, also 1124, 93 Cong. Rec. 3837, also 4193. It is clear that if a union is to survive, it must meet in some manner the threat of the "free-rider," the employee who wants to take all the benefits of union activity and share none of the burdens. A natural course is a union security provision in the collective bargaining agreement. We respectfully submit that if a mild provision, of the kind here involved, will meet the parties' needs, it should be encouraged and not discouraged by the NLRB.

Nowhere in the legislative history of the 1947 amendments is there any evidence of a Congressional intent to prevent a union from requiring the membership of the employees who were members of the union on the effective

date of the union security agreement or joined the union subsequently and still retain their employee status.

As the Board stated in the case of *Charles A. Krause Milling Company*, 97 NLRB 536:

“This is emphasized by the constant and exclusive reference to the hiring process and to *new* employees.”

See statements by Congressman Mead, 93 Daily Cong. Rec. A2011; Congressmen Smith (Ohio), 93 Cong. Rec. 3620; and Magnuson, 93 Cong. Rec. A2668; and by Senator Ball, 93 Cong. Rec. A2252.

The “maintenance of membership clause” is just what the phrase says. *Employee* members when the contract is signed who leave the unit but retain *employee* status and later return, are required to maintain that membership, for the obvious purpose of any union is to maintain its members within the collective bargaining unit.

Of course, the maintenance of membership provision is the mildest form of union security. To construe this clause against the employer and the union by holding that it does not require maintenance of membership by an employee who has not severed his employment relationship is to ignore the realities. At page 13 of its brief, the Board states that an individual who returns from a leave-of-absence or a transfer or a layoff “stands in the same shoes as one being hired by the respondent company for the first time.” This is so patently false that it needs no reply here.

III.

The Board's Decision in This Case Is Inconsistent With Its Own Earlier Rulings on the Status of Laid Off Employees.

We cannot conceive that it was the intention of the Board to phrase an order which requires that employees returning to work following a layoff be treated the same as employees whose employment is severed and who return to work as new employees. Yet this seems to be the strained construction which the General Counsel is placing on the Board's Decision.

Earlier decisions of the Board had clearly preserved the distinction for which we urge here. We agree that an employee who quits his job or is discharged and later rehired, if he withdrew from the Union, has the rights of a new employee. Where an ordinary maintenance of membership clause is in effect, such persons have the status of new employees. See *Idarado Mining Co.*, 77 NLRB 392; and *General American Air Coach*, 90 NLRB 279. In the *Idarado* case, the Board stated the issue as follows:

"The lawfulness of the Respondent's discharge of Miller depends on whether, under the terms of the maintenance-of-membership clause, Miller was obligated to become a member in good standing of the mine production workers after his *reemployment* by the Respondent." (Italics added.)

But as the Trial Examiner stated in that case at page 400:

"The record is clear and the undersigned finds, that when Miller returned to the Respondent's em-

ploy in November 1945, he was rehired as a new employee. . . . Upon his separation in November 1944 he forfeited all his seniority rights and other privileges. He did not regain, as far as the record reveals, those rights and privileges when he was rehired."

If, as it appears, the Board has ruled that a laid-off employee must be treated as a new hire upon his return to work, the Board in the instant case has set up a new and different rule from its procedures under Section 9 of the Act in election proceedings conducted under the auspices of the NLRB. It has been a well-settled rule that employees who are temporarily laid off remain eligible to vote in NLRB representation elections. *Servel*, 65 NLRB 1067; *Swift & Company*, 27 NLRB 903. In these and many other cases, the Board has also considered the eligibility of employees under group insurance plans and other benefits. *International Shoe Company*, 14 NLRB 1140; *Buckeye Oil Company*, 102 NLRB 112. The Board has also ruled that employees who have been granted leaves-of-absence are considered eligible to vote. *American Cyanamid and Chemical Corp.* (1939), 11 NLRB 803; *Armour & Co.* (1949), 83 NLRB 333. Employees who stop working because of poor health are treated as on sick leave and are eligible to vote. *Wright Manufacturing Company*, 106 NLRB 210.

The United States Supreme Court and several of the Federal Circuit Courts have held that the employee status of an employee laid off due to a suspension of work continues because the relation of employer and em-

ployee does not terminate. See *Fishgold v. Sullivan Dry Dock and Repair Company*, 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, 167 A. L. R. 110 (1946). To the same effect, see the opinion in the *Fishgold* case in the Second Circuit Court of Appeals written by Judge Learned Hand, reported at 154 F. 2d 785 (1946).

In the case of *North Whittier Heights Citrus Association v. N. L. R. B.*, 109 F. 2d 76 (9th Cir., 1940), the Citrus Association laid off certain employees and contended that the layoff was, in fact, a discharge so that the NLRB could not order reinstatement with back pay, since such a right of reinstatement was restricted to someone who maintained an employee relationship. This Circuit held that the layoff because of such temporary shut-down did not sever the relationship of employer and employee. The Court stated in that case:

“The relation of employer and employee does not always depend upon continuity of actual every day work.”

We respectfully submit the same ruling applies to the instant case.

In the case of *N. L. R. B. v. Waterman Steamship Corporation*, 309 U. S. 206, 60 S. Ct. 493, Mr. Justice Black stated:

“No obstacle of legal principle barred the board from finding that there was, even after the ships were temporarily laid up, a relationship of employment or tenure between the Waterman Company and its men.”

The Court further noted that "A large part of all industrial employment is of this nature."

In the case of *Bakery & Confectionery W. I. U. v. National Biscuit Co.*, 177 F. 2d 684 (3 Cir., 1949), the court stated:

"The Supreme Court of the United States, quoting the Oxford English Dictionary had recognized the sharp distinction between a temporary suspension of an employee's work known in common and industrial parlance as a 'layoff' and 'termination' of the employment relationship or loss of a position."

See also:

Lord Manufacturing Co. v. Nemenz, 55 Fed. Supp. 711, 723.

The Board's prior, much more realistic approach is demonstrated in *Bethlehem Steel Co.*, 86 NLRB 577. There the Board in determining which employees were eligible to vote in a Labor Board election, ruled as follows:

"The number of employees employed at the San Pedro yard varies considerably. It is the policy of the Employer to retain on its pay roll for a 30-day period all temporarily laid-off employees. Moreover, under the provisions of the Intervenor's contract with the Employer, laid-off employees, who had been employed for more than 30 days, may be recalled and do not lose seniority rights if rehired within 12 months of their layoff. In view of these facts, we find that the laid-off employees retained on the pay roll and the employees laid off for not more than 12 months, who may be recalled under the terms

of the Intervenor's contract, have a reasonable expectation of reemployment by the Employer and are entitled to vote unless they have obtained permanent employment elsewhere."

We respectfully urge this Court, to require the Board to follow this same sensible approach when adjudicating concerning union security provisions.

IV.

The Board's Broad Ruling Concerning Union Security Clauses Was Based on an Inadequate Record and Therefore Does Not Take Into Account the Many Practical Problems Created by It.

An additional difficulty with the Board's decision and the argument as presented in its brief is the fact that the inferences and conclusions therein are drawn from a totally inadequate record devoid of setting forth the practical problems and facts of industrial life. In referring to the legality of union security arrangements, the Board's General Counsel states at page 11 of his brief:

"Any doubt must be resolved against the Union."

If this is so, we submit that the Board should give unions an opportunity to present a complete and full record concerning the intention of the parties in executing various forms of union security clauses and their practices in administering them. Under well-recognized concepts of civil law "a contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civil Code of California, Section 1647. In other cases the Board itself has given

weight to the practices of the parties in interpreting an ambiguous union security clause. *Seattle Bakers Bureau, Inc.*, 101 NLRB 196.

Yet, in the instant case, practically no testimony was presented and the Board's Counsel "persuaded" the union business agent, who was the only representative of the union at the hearing before the trial examiner, to make a record consisting almost entirely of stipulations. It is apparent that at the time of the hearing the respondent union had no idea that the Board would seek so broad an Order and Decree as it does now. Otherwise the stipulations would never have been accepted and further evidence would have been presented.

The International Association of Machinists, in its Exceptions to the Board, requested permission to reopen the record and to argue orally due to the fact that the record was incomplete. The Board saw fit to deny this request. Instead, it read into the evidence interpretations of the union security clause which were neither intended by the parties nor supported by the record. Under such conditions we are compelled to present to this Court the essential realities of industrial life which ought to be taken into account in rulings relating to union security. For the "meat and muscle" of labor relations are not words alone and it is the particular vice of the Board's position in this case that it is taken without reference to or apparent knowledge of the factual situation necessitating the union security clause in question.

As a result of the fluctuating nature of government contracts, there are frequently in the aircraft industry large numbers of laid off employees, running into the thousands. Such employees, as a rule, retain seniority and recall rights for a period of two years. In a similiar fashion, employees may be transferred out of the bargaining unit and for periods of time are not working within the bargaining unit. Referring to another common situation, the automobile industry has long been characterized by the so-called annual model-change layoff. This, in the case of a major manufacturer, may result in the suspension of work for a brief period of time for hundreds of thousands of employees.

To treat individuals returning to work under any of the aforescribed circumstances as new employees (for purposes of union security or indeed for any other purpose) is so unrealistic as to be almost fantastic. It would leave the parties time for little else than to see to the problem of proper administration of the union security provisions in their agreements to the obvious detriment of more important ends.

Summary and Conclusion.

The confusion created by the Board in this case may have been caused in part by the use of the words "upon rehire within the bargaining unit" in the union security provisions involved. The use of these words may well have been an unfortunate one. But we agree with IAM when it argues that Pense's discharge was in any event

lawful because it was in accordance with the unquestionably valid union security requirements of the agreement and was not for a reason other than the failure to tender monthly union dues or initiation fees uniformly required to maintain union membership.

Beyond this, as we have already argued, the Board and its General Counsel in this case have gone unnecessarily far and created unnecessary confusion by arguing that an employee returning from a layoff or leave-of-absence or transfer is in the position of one being “rehired” within the bargaining unit. Such an employee is not rehired. There is no break in the employment status. A mere change in that status is not a rehire. The benefits, rights and duties of the employment relationship are not changed. Only in the case of a quit or a discharge is there a definite and final severance of all benefits, rights and privileges under the collective bargaining contract.³

We respectfully urge this Court to make plain this elementary and common sense distinction and hold that the statutory prohibitions against requiring immediate union membership apply only to *new* employees and employees

³The seniority clauses in the collective bargaining contracts [General Counsel’s Exhibits Nos. 6 and 9] provide and guarantee certain rights to employees on layoff or leave-of-absence. In either case the employer-employee relationship continues and the employee derives rights from the collective agreement. The same holds true for an employee who is transferred out of the unit or becomes a supervisor. Thus, although an employee may not for a time be working within the bargaining unit, he maintains his connection with and rights in it.

rehired following a quit or final discharge and do not apply to employees returning to work in the bargaining unit following a layoff, leave-of-absence or transfer.

Respectfully submitted,

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Dated: October 11, 1956.



No. 15101

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

HAZEL ANNA WOLF,

Appellant,

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization
Service,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

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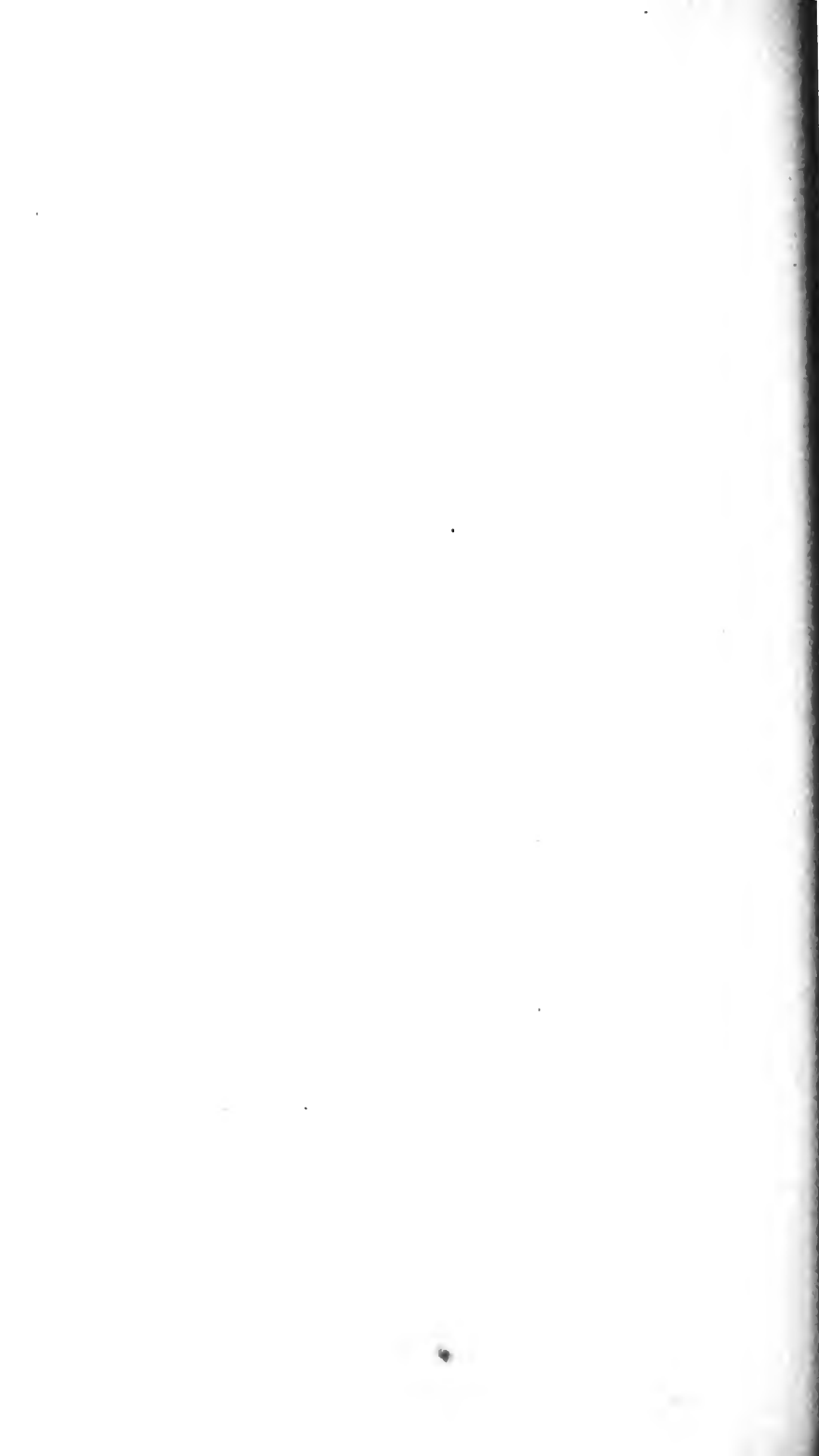
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HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of the District Court is conferred by the provisions of Section 2241, Title 28, United States Code, and on this Court by Section 2253, Title 28, United States Code.

STATUTES INVOLVED

The statutes involved are the Immigration and Nationality Act of 1952, Section 244, 66 Stat. 214, 8 U.S.C. 1254, and Title 8, C.F.R., Sections 6.1(d), 6.2, 244.2, 242.54(d), and 242.61.

STATEMENT OF THE CASE

The appellant herein challenges the validity of an order of the Board of Immigration Appeals denying her motion to reopen the deportation hearing, upon the alleged ground that said order denied appellant an opportunity to file an application for suspension of deportation under the provisions of Section 244 of the Immigration and Nationality Act of 1952 (R. 1, pp. 5, 6).¹ The facts of the case are accurately stated in the Memorandum Decision of the District Court (R. 10), and are restated here for convenience.

The appellant was found deportable by a Hearing Officer of the Immigration and Naturalization Serv-

¹ The original papers filed in the District Court action constitute the record on appeal herein. The citation, R. 1, refers to the first document as listed by the Certificate of Clerk of U. S. District Court to Record on Appeal. This method of citation will be followed throughout the brief, and corresponds to the method utilized in appellant's brief. Page references refer to the page of the cited document.

ice on April 10, 1951, on the charges contained in the warrant for her arrest; namely, that she was a member of an organization which advocated the overthrow of the government of the United States and circulated written and printed matter so advocating under the Act of October 16, 1918, as amended, and that after entry she was an alien who was a member of the Communist Party of the United States (R. 10, p. 2). The decision of the Hearing Officer was adopted by the Commissioner on January 2, 1952, and after appeal to the Board of Immigration Appeals, the Board dismissed the appellant's (petitioner therein) appeal on November 5, 1952. An action for judicial review was instituted in the court below on November 25, 1952, and said action was dismissed on February 4, 1953. An appeal was taken to the Court of Appeals for the Ninth Circuit and the decision of the District Court was affirmed. *Wolf v. Boyd*, 215 F. 2d 377 (C.A. 9, 1954). On February 28, 1955, the United States Supreme Court denied certiorari (348 U.S. 951, 99 L.Ed. 743, 75 S.Ct. 438). Thereafter a private bill, S. 1425, was introduced on the appellant's behalf by Senator Langer and on October 21, 1955, a stay of deportation was granted until February 1, 1956, by the Commissioner of Immigration and Naturalization. Favorable action on the bill was not taken by Congress. A subsequent stay of deportation was granted by the Commis-

sioner until February 10, 1956, upon appellant's filing of a motion to reopen the deportation proceedings. Appellant's motion to reopen the deportation proceedings was filed on January 27, 1956, and was addressed to the Board of Immigration Appeals.

On February 8, 1956, the Board of Immigration Appeals denied appellant's motion to reopen the deportation proceedings and on February 9, 1956, appellant filed a "Petition for Writ of Habeas Corpus, and Order To Show Cause; for Declaratory Judgment and Injunctive Relief," after having been ordered to report for deportation on February 10, 1956. The petition alleged that the order of the Board of Immigration Appeals dated February 8, 1956, denied the petitioner therein the right to apply for suspension of deportation under Section 244 of the Immigration and Nationality Act of 1952. The lower court denied the application for writ of habeas corpus and discharged the rule to show cause theretofore issued. This appeal followed.

QUESTIONS PRESENTED

1. Is appellant, who is an alien ordered deported prior to the effective date of the Immigration and Nationality Act of 1952, entitled as a matter of right to an administrative hearing on an application for sus-

pension of deportation under the provisions of the 1952 Act and Regulations pursuant thereto?

2. Did the denial of appellant's motion of January 27, 1956, to reopen the deportation hearing constitute an exercise of discretion of the Attorney General or his authorized delegate, under the provisions of the Immigration and Nationality Act of 1952?

SUMMARY OF ARGUMENT

The validity of the deportation order is not in issue in this appeal. That issue has been passed upon by the District Court and this Court of Appeals, with certiorari denied by the United States Supreme Court; the appellant has conceded that the matter is not an issue herein.

There is no applicable procedure specified in the Immigration and Nationality Act of 1952 or the regulations thereunder which govern the manner in which an application may be made for suspension of deportation under the provisions of the Act in cases such as the instant case, wherein the deportation proceedings were concluded prior to the effective date of the Act. In such cases the requirements of due process do not necessitate a formal hearing upon an application for suspension of deportation.

The appellant applied for discretionary relief under the provisions of the Immigration and Nationality Act of 1952 by filing her motion to reopen the deportation proceedings, and the Board of Immigration Appeals in denying said application expressly exercised the discretionary authority of the Attorney General to do so under the Act. In doing so, the Board gave overall consideration to the merits of the issue of suspension of deportation on the basis of the facts disclosed by appellant's motion to reopen and the record of her deportation hearing, and exercised its discretion against remission.

As the manner of exercising such discretion has not been challenged, the issue before the District Court related solely to whether the discretionary authority of the Attorney General to suspend deportation had been exercised. The court below correctly concluded that the discretion of the Attorney General had been exercised, and properly dismissed the petition for writ of habeas corpus.

ARGUMENT

I.

Is appellant, who is an alien ordered deported prior to the effective date of the Immigration and Nationality Act of 1952, entitled as a matter of right to an administrative hearing on an application for suspension of deportation under the provisions of the 1952 Act and Regulations pursuant thereto?

Appellant herein was ordered deported on January 2, 1952. The validity of the deportation proceedings is not an issue in this appeal. Subsequently, on January 27, 1956, appellant filed a motion to reopen the deportation proceedings, which motion was addressed to the Board of Immigration Appeals.

Appellant argues that Section 244 of the Immigration and Nationality Act of 1952 (66 Stat. 214, 8 U.S.C. 1254) provides that the Attorney General may, in certain enumerated instances, act to suspend deportation, and that inasmuch as administrative regulations formulated pursuant to the Act provide for hearings on applications for suspension of deportation, appellant in this case is entitled to such a hearing on the issue of her application for suspension of deportation.

As a review of the pertinent provisions of the Act and the regulations will demonstrate, the argument is

invalid because there is no applicable procedure specified in the 1952 Act or preceding acts which require a hearing upon an application for suspension of deportation in cases where, as here, the deportation hearing was concluded prior to the effective date of the 1952 Act. In such cases the requirements of due process do not require a formal hearing.

Section 244 (a) (5) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254 (a) (5), under the provisions of which appellant seeks suspension of deportation, provides as follows:

“As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who—

* * * *

“(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241 (a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241 (a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such

period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

While aliens occupying the status of appellant were not eligible for suspension of deportation with the discretion of the Attorney General under the preceding Act, aliens deportable for other reasons were, and the regulations governing applications for discretionary relief had been in effect governing such procedure. Cases involving the preceding statutes and regulations will hereinafter be considered as they relate to the instant case.

Following the enactment of the Immigration and Nationality Act of 1952 the regulations applicable to procedures under the new law were revised and re-numbered with each part of subchapter B of Chapter I of Immigration and Naturalization Regulations, 8 C.F.R., given the same number as the section of the Immigration and Nationality Act to which it relates. Section 244.2 relates to suspension of deportation and provides:

“An application for suspension of deportation shall be submitted in accordance with, and subject to, the provisions of § 242.54 (d) of this chapter and shall be determined and disposed of in accordance with the provisions of this part and § 242.61 of this chapter.”

Section 242.54 (d) above referred to provides:

“Application for discretionary relief. Except in the case of an alien who is prima facie deportable under Section 242 (f) of the Immigration and Nationality Act, at any time during the hearing the respondent may apply for suspension of deportation on Form I - 256A or for voluntary departure, under section 244 of the said Act. The burden of establishing that he meets the statutory requirements for discretionary relief shall be upon the respondent. He may submit any evidence in support of his application which he believes should be considered by the special inquiry officer.” (Emphasis supplied.)

Section 242.61, not set forth herein but also referred to above in quoted section 244.2, relates in detail to the procedure to be followed by the special inquiry officer in reaching and giving notice of a decision, as well as to appeals therefrom.

All the regulations relating to applications for suspension of deportation provide that such applications are to be made *during the course of administrative hearing* before the special inquiry officer, and there is no provision for application to be made at any other time. See *Perez-Perez v. Westmoreland*, 122 F.

Supp. 385 (D.C. S.D. Cal., 1954). Thus it is apparent that the statute and regulations promulgated thereunder do not provide for a hearing on the issue of discretionary relief or suspension of deportation in cases wherein the order of deportation has been entered prior to the 1952 Act, since in those cases the hearings have been concluded prior to the time when regulations were adopted to authorize the filing of applications for suspension of deportation *during* the hearings.

It is fundamental that the requirements of due process do not necessitate a hearing upon every administrative action, and where, as here, the statute and regulations thereunder do not provide for such hearings, the administrative proceedings are not therefore rendered invalid.

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 94 L.Ed. 317, 70 S.Ct. 309 (1950);

Federal Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265, 93, L.Ed. 1353, 69 S.Ct. 1097 (1949);

Bi-Metallic Investment Co. v. State Board of Equalization of Colorado, 239 U.S. 441, 60 L.Ed. 372, 36 S.Ct. 141 (1915).

In a decidedly analogous case the Courts of Appeals for the Second Circuit held that a hearing upon the issue of suspension of deportation is unnecessary to satisfy the requirements of due process. See *United*

States ex rel. Adel v. Shaughnessy, 183 F. 2d 371 (C.A. 2, 1950). In that case the alien had been ordered deported in 1947. She obtained several stays, and accordingly, had not been deported when, on July 1, 1948, Congress amended the applicable statute so that, for the first time, she became eligible to apply for suspension of deportation. She applied to the Board of Immigration Appeals to reopen and reconsider her case and to pass upon her application for suspension of deportation. The Board denied her request, and she thereupon petitioned for a writ of habeas corpus in the federal district court. In its decision on the appeal from an order dismissing the writ, the Court stated:

“Relator argues that she was entitled, after the statute’s amendment, to a new hearing in which she might present evidence to show that she had never been connected with the business of prostitution. Assuming, *arguendo*, that ordinarily such a person would have been entitled to such a hearing, relator had no such right because the Board could properly rely on the findings of the Inspector made in 1946. Those findings were supported by sufficient evidence. Consequently, the Board could properly base its discretionary determination on those findings. The courts cannot review the exercise of such discretion; they can interfere only when there has been a clear abuse of discretion or a clear failure to exercise discretion.”

As in the instant case, the alien sought a hearing to enable her to establish her eligibility under the latter statute for suspension of deportation, and as in

the instant case, the district court held such a hearing unnecessary, the Court of Appeals affirming the decision.

The Court of Appeals for the Third Circuit had occasion to rule on a case similarly in point in *Arakas v. Zimmerman*, 200 F. 2d 322 (C.A. 3, 1952). The pertinent facts and decision are set forth below:

“On October 6, 1949, appellant was ordered to surrender for deportation. He petitioned the Commissioner for a stay so that he might become eligible for a suspension of deportation under the seven years’ residence provision of a 1948 amendment to the Immigration Act, 8 U.S.C.A. Section 155(c), *infra*. The Commissioner denied the application. Arakas appealed to the Board and at the same time moved for reopening of the proceedings for consideration of suspension of deportation. The Board denied both the application for stay and motion to reopen by its order of October 26, 1949. He, having by that time established his seven years’ residence, applied to the Board for a reopening of the proceedings. The motion was denied and the petition for habeas corpus followed. The motion to dismiss that petition was granted by the district court on September 26, 1951.

“The issue before us is whether, on the above facts, due process requires that appellant be granted a hearing on his application for suspension of deportation. [Emphasis supplied.]

* * * * *

“Appellant contends that Subsection 150.6(g) of the Regulations gave him the right to a hearing on his motion and that at such hearing he was

entitled to introduce evidence on behalf of his application. This claim is completely without foundation. The particular subsection relied on relates to and outlines the procedure an alien may use *during his deportation hearing* in order to apply for suspension of deportation under 8 U.S.C.A. Section 155(c). It has no bearing on the present facts. The application at bar which asks that the *deportation hearing be reopened* illustrates this. At the time it was made the deportation hearings on Arakas had been long since concluded. There had been no motion of that type during those hearings, nor could there have been because the seven years' residence provision of Section 155(c) of the immigration law did not come into existence until 1948 and in 1944 Arakas had only been in the United States for one and a half years.

* * * * *

“Under the law the Board of Immigration Appeals, acting for the Attorney General, had the duty of exercising its discretion and deciding whether appellant's hearing should be reopened and the order for his deportation reconsidered. We find that it did this and that its decision not to reopen the hearing was properly based upon sufficient evidence. We have no right to disturb that determination.

“The judgment of the district court will be affirmed.”

And so it is here. Appellant could not have applied for suspension of deportation during the course of the deportation hearing, as provided for in the regulations, because the provisions of the statute and regulations relied upon by appellant for the suspension of her deportation did not come into existence until

1952, and the hearing had been concluded prior to that time in 1951. Appellant was not accorded a hearing on the issue of suspension of deportation, since such a hearing was rendered unnecessary by the exercise of discretion of the Board of Immigration Appeals in deciding against suspension of deportation upon the merits of the case.

Although the statute and regulations involved in the decisions referred to preceded the Immigration and Nationality Act of 1952, the cases are in point, as they relate to similar motions to reopen deportation hearings to permit applications for suspension of deportation. The motions to reopen in those cases, as well as in the present case, were filed at a time when legislation had been enacted authorizing the suspension of deportation for aliens occupying a status alleged to be held by the moving parties. Regulations adopted pursuant to the preceding statutes as well as the present Act provided that applications for suspension of deportation could be made *during* the deportation hearing, but they did not provide in either case a procedure whereby concluded deportation hearings could be reopened as a matter of right to permit applications for suspension of deportation. The courts in those cases affirmed the orders of the Board of Immigration Appeals, finding in effect that the issue

of suspension of deportation had been determined on the merits and that a hearing thereon was unnecessary.

The Supreme Court, in *Marcello v. Bonds*, 349 U.S. 302, 99 L.Ed. 1107, 75 S.Ct. 757, had before it an appeal challenging the validity of an order of deportation. In its opinion the Court noted that the Board of Immigration Appeals had considered the issue of suspension of deportation under Section 244(a) (5) of the Immigration and Nationality Act of 1952, the same statute under consideration in the subject case. The Court observed that the Board considered the issue although no formal application for suspension had been made, and had exercised its discretion against remission. Although the issue was not before it, the Court did recognize that the Board could and did consider suspension of deportation without a hearing on the issue.

“Petitioner and counsel were advised of their right to apply to the Attorney General for the discretionary relief of suspension of deportation under § 244 (a) (5) of the Act. At first they declined to do so, but subsequently they moved to reopen the hearing to apply for such relief. The special inquiry officer denied the motion. On appeal, the Board of Immigration Appeals affirmed the order of deportation. Though no formal application for suspension of deportation under § 244 (a) (5) had been filed, the Board considered whether such relief was merited but exercised its discretion against the remission.” *Marcello v. Bonds*, *supra*.

As in the instant case, no application for suspension could have been made *during* the deportation hearing, because that hearing was concluded prior to the time when relief was requested. Nevertheless, as the Supreme Court observed, the Board exercised its discretion against remission without a hearing or a formal application on the issue of suspension. Under these circumstances, the case necessarily lends support to appellee's position that in such cases the procedure followed under the prior Act is applicable to the subject case arising under the 1952 Act.

It is submitted that the foregoing authorities clearly establish the correctness of the lower court's ruling that a hearing on appellant's motion to reopen to permit an application for suspension of deportation was unnecessary. Neither the statute nor the regulations provide for such a hearing as a matter of right, and the Board of Immigration Appeals properly denied the motion to reopen after considering the issue of suspension of deportation on the merits. The lower court accurately interpreted the statute, regulations and controlling authorities, and correctly held a hearing on the application for suspension of deportation to be unnecessary.

II.

Did the denial of appellant's motion of January 27, 1956, to reopen the deportation hearing constitute an exercise of discretion of the Attorney General or his authorized delegate, under the provisions of the Immigration and Nationality Act of 1952?

Appellant has argued that she was denied her right to a hearing upon the issue of her application for suspension of deportation, inasmuch as the Board of Immigration Appeals denied her motion to reopen the deportation hearing to permit her to make such an application. She further argues that because she was not permitted to make an application for suspension of deportation there has been no exercise of discretion on the part of the Attorney General or his delegate on that issue.

The first contention has been answered in Argument I herein, to the effect, summarized in simplest terms, that appellant was not entitled to such a hearing as a matter of right. The second contention is invalid because the conclusion reached therein does not necessarily follow . . . the issue of suspension of deportation could have been and was determined by the Board of Immigration Appeals without a hearing on the issue. Regardless of the fact that appellant was not accorded a hearing to enable her to make an appli-

cation for suspension of deportation, the issue of suspension of deportation in appellant's case was fully considered by the Board of Immigration Appeals and it exercised its discretion against remission.

The court below set forth the measure of what constitutes compliance with the requirements of due process, where, as here, the applicant has allegedly become eligible for suspension but no procedure has been provided whereby an application may be made:

“There being no regulation specially directing the manner in which an application for discretionary relief shall be made by one situated as petitioner it would appear that she has been granted procedural due process if, after an overall evaluation of the procedures used, the facts disclosed and the decision reached, the statutory act of grace permitted the Attorney General actually has been made available to petitioner, accorded consideration and either denied or granted. *Application of Orlando*, 131 F. Supp. 485, affirmed 222 F. 2d 537.” (Memorandum Decision, R. 10, p. 10.)

The rule as thus stated was applied prior to the 1952 Act, as was demonstrated in the first portion of our Argument. See *Arakas v. Zimmerman*, 200 F. 2d 322 (C.A. 3, 1952); *United States ex rel. Adel v. Shaughnessy*, 183 F. 2d 371 (C.A. 2, 1950); and *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489 (C.A. 2, 1950). Similar disposition of the issue was reached in a case involving Section 244 (a) (5)

of the Immigration and Nationality Act of 1952, the provision relied upon by appellant herein. See *Marcello v. Bonds*, 349 U.S. 302, 99 L.Ed. 1107, 75 S.Ct. 757.

In *Arakas v. Zimmerman*, *supra*, the Court of Appeals for the Third Circuit applied the rule in rejecting the contention that due process requires a hearing on a motion to reopen to permit the filing of an application for suspension of deportation, and concluded as follows:

“Under the law the Board of Immigration Appeals, acting for the Attorney General, had the duty of exercising its discretion and deciding whether appellant’s hearing should be reopened and the order for his deportation reconsidered. We find that it did this and that its decision not to reopen the hearing was properly based upon sufficient evidence. We have no right to disturb that determination.”

The current Regulations of the Immigration and Naturalization Service, which supplement the Immigration and Nationality Act, similarly fix the responsibility of the Board of Immigration Appeals as to exercising the discretion of the Attorney General in deciding whether appellant’s hearing should be reopened and the order for her deportation reconsidered. Motions to reopen or reconsider are within the jurisdiction of the Board of Immigration Appeals under

the provisions of 8 C.F.R., Part 6.2. Part 6.1 (d) of the Code of Federal Regulations provides:

“Powers of the Board—(1) Generally. Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case, except that the Board shall have no authority to consider or determine the manner, at whose expense, or to which country an alien shall be deported.”

And accordingly, the Board of Immigration Appeals did exercise its discretion for the Attorney General in considering and denying suspension of deportation in the present case. An examination of the Board's order of February 8, 1956, denying the appellant's motion to reopen the hearing, discloses that the Board, in rendering its decision, fully considered the issue of suspension of deportation upon the entire record of the deportation hearing. The order, which was made a part of the respondent's return in the District Court (R. 4, Exhibit C) and is set forth in the court's memorandum decision (R. 10, pp. 4, 5 and 6), for convenience is set forth below:

“This case is before us on counsel's motion for reopening which was filed on January 27, 1956.

“On November 5, 1952, we dismissed the respondent's appeal from a decision of the Acting Assistant Commissioner, directing deportation on two

charges based on the Act of October 16, 1918 as amended by the Alien Registration Act of 1940, 8 U.S.C. 137. Thereafter, habeas corpus proceedings were instituted by the respondent which resulted in a decision adverse to her in the United States District Court. This judgment was affirmed by the United States Court of Appeals for the Ninth Circuit on August 10, 1954, and a rehearing was denied on October 11, 1954. *Wolf v. Boyd*, 215 F. 2d 377 (C.A. 9, 1954). On February 28, 1955 certiorari was denied, 348 U.S. 951.

“The present motion seeks to have the hearing reopened to permit the respondent to file an application for suspension of deportation under the provisions of Section 244(a)(5) of the Immigration and Nationality Act. We have previously held that an application for discretionary relief must be submitted during the Immigration hearing. *Matter of M—*, 5 I&N Dec. 472 (1953); *Matter of C—*, 5 I&N Dec. 630 (1954). In *Marcello v. Bonds*, 349 U.S. 302, 313 (1955) the court said that this Board was not bound to consider the question of suspending deportation on the merits where the alien had failed to make an application for that relief at the hearing before the special inquiry officer. Our decisions in *Matter of M—* and *Matter of C—*, supra, are not controlling because the respondent was not eligible for suspension of deportation under the legislation which was in effect when the hearing was closed on February 12, 1951. However, they do indicate the necessity for promptness in making such an application.

“The Immigration and Nationality Act became law on June 27, 1952 and was effective on December 24, 1952. Over three years have elapsed from the latter date and the motion to reopen contains no explanation for the delay in its sub-

mission. We note that the Supreme Court handed down its decision in the respondent's case on February 28, 1955 and that counsel's affidavit in support of the motion is dated March 16, 1955. A serious administrative problem would be created for the Service if we were to sanction a procedure by which counsel could remain inactive until deportation was imminent and then upset the proceeding with a motion to reopen for discretionary relief which apparently could have been submitted at any time after December 24, 1952.

"The respondent declined to testify at the hearing on the advice of counsel. The motion to reopen contains no information as to whether the respondent admits that she was a member of the Communist Party and if so, whether such membership has terminated and the date of termination. 8 C.F.R. 6.21 provides that motions to reopen shall be supported by affidavits or other evidentiary material. As applied to this respondent, who is attempting to secure the exercise of administrative discretion, we believe this regulation made it incumbent upon her to furnish her own affidavit concerning the period of her membership in the Communist Party, the extent of her activities while a member, the date when she terminated her membership, and detailed information as to the hardship which would result to her if she is deported.

"8 C.F.R. 6.21 also provides that in any case in which a deportation order is in effect, there shall be included in the motion to reopen a statement by or on behalf of the moving party declaring whether or not the alien is the subject of any criminal proceeding under Section 242(e) of the Immigration and Nationality Act and, where the motion is for the purpose of securing discretionary relief, there is to be included a statement as to whether or not the alien is subject to any

pending criminal prosecution. The motion fails to comply with these two requirements.

“It is well settled that a rehearing in an administrative proceeding is not a matter of right but lies within the discretion of the agency making the order. *United States et al v. Pierce Auto Freight Lines, Inc. et al*, 327 U.S. 515, 535 (1946); *Interstate Commerce Commission et al v. City of Jersey City et al*, 322 U.S. 503, 514 (1944). The facts asserted in the motion to reopen are not persuasive that this case merits the exercise of the discretionary authority to suspend deportation. After careful review of the record, it is our considered opinion that a reopening of the proceeding is not warranted and counsel’s motion will, therefore, be denied.

“ORDER: It is ordered that counsel’s motion be and the same is hereby denied.

“Thos. G. Finucane
Chairman”

The lower court in its memorandum decision with forceful reason and logic concluded with respect to the Board’s order, *supra*:

“Considering in this case the procedure used, the facts disclosed and decision reached, it must be admitted that petitioner’s right to ask for discretionary relief was recognized when the Board of Appeals accepted and acted as it did upon the motion to reopen. The Board in its decision reviewed briefly petitioner’s record with respect to earlier administrative and judicial proceedings. It indicated its views as to the inadequacy of the showing made in connection with the motion to reopen. While these views were directed in such a manner as to appear related only to procedural defects they likewise show that the Board was

familiar with and had considered the merits of petitioner's case. The concluding two sentences of the final paragraph of the Board's decision reading as follows:

'The facts asserted in the motion to reopen are not persuasive that this case merits the exercise of the discretionary authority to suspend deportation. After careful review of the record, it is our considered opinion that a reopening of the proceeding is not warranted and counsel's motion will, therefore, be denied.'

indicate to the court that the Board after recognizing petitioner's right to apply for suspension of deportation and thus invoke the discretion of the Attorney General reviewed its own record of her case which obviously was before and available to it, considered the showing as made and exercised its discretion on behalf of the Attorney General on the merits of any application for suspension of deportation that might be made as proposed in the motion to reopen and did so unfavorably by denying the motion to reopen deportation proceedings.

"The Board's right to rely upon the findings of an earlier hearing on petitioner's deportability in exercising its discretion is supported by *Adel v. Shaughnessy*, supra; *Kavadias v. Cross*, 82 F. Supp. 716.

"The manner in which the discretion is exercised is not a controlling factor where the claim is as here that discretion has not been exercised. *Accardi v. Shaughnessy*, supra.

"In the case of *James v. Shaughnessy*, 202 F. 2d 519 where an application for suspension of deportation had been denied and the claim was that its denial was not the result of an actual exercise of discretion but of an unlawful refusal to exercise it, Judge Chase in speaking for the Court of

Appeals upon relator's appeal from a denial of a writ, affirmed the lower court, stating:

'The appellant does not now raise any question as to the deportation order itself. Admittedly he is deportable on the ground above stated; and if his application for the suspension of the order has been duly considered and decision reached on an overall evaluation of the circumstances shown, this appeal must fail.'

"So here it is the court's conclusion that petitioner, concededly deportable under a valid order of deportation, has in effect received consideration of an application for suspension of deportation, the application being by way of a motion to reopen proceedings, and a decision was reached thereon by an overall evaluation of the facts and circumstances revealed by the motion to reopen as well as the record already before the Board as a result of earlier hearings. Under such circumstances the petition should be dismissed."

It is submitted that the record in this appeal clearly shows the District Court's thorough familiarity with the issues of fact and principles of law involved, and that the court correctly held appellant not to be entitled as a matter of right to a hearing upon the issue of suspension of deportation, and further, that the Board of Immigration Appeals did exercise its discretion for the Attorney General in denying appellant's motion to reopen the hearing.

III.

Appellant's Argument

The principal contentions set forth in appellant's opening brief have been answered in Arguments I and II herein. However, we shall briefly refer to that portion of appellant's argument which maintains, in effect, that the subject case is distinguishable from those cases relied upon by appellee which hold that the issue of suspension of deportation may be considered and determined without the necessity of a hearing upon that issue. Appellant attempts to distinguish the holdings in such cases from the subject case upon the contention that in the subject case appellant has established, in her motion to reopen the deportation hearing, a *prima facie* case as to her eligibility for suspension of deportation; whereas, it is asserted, in those cases holding a hearing unnecessary upon the issue of suspension of deportation, it appeared from the record that the petitioner was not entitled to suspension of deportation. Appellant further argues that such an interpretation is required by the regulations in that the Board of Immigration Appeals is not given the power to pass upon applications for suspension of deportation except in an appellate capacity following the making of a record before a special inquiry officer.

In attempting to thus distinguish those cases from the subject case, he points out that in *United States ex rel. James v. Shaughnessy*, 202 F. 2d 519 (C.A. 2, 1953), cited by the court below in its decision, and *Kavadias v. Cross*, 82 F. Supp. 716 (D.C. N.D. Indiana, 1948) (reversed on other grounds, 177 F. 2d 497 (C.A. 7, 1949)), and *United States ex rel. Adel v. Shaughnessy*, 183 F. 2d 371 (C.A. 2, 1950), relied upon by appellee, the petitioners therein made no *prima facie* showing that they were eligible for suspension of deportation. Appellant's argument, summarized, appears to be that in such cases the Board of Immigration Appeals can exercise its discretion and deny suspension of deportation on the record of the deportation hearing without a further hearing on the application to suspend deportation, but that in the subject case there must be a hearing on the application because appellant has made a *prima facie* showing of eligibility for suspension of deportation.

But the decisions cited do not permit the limited construction appellant would have the Court apply. The decisions not only hold that the petitioners therein were entitled to an exercise of the discretion of the Attorney General on the issue of suspension of deportation, but that such discretion had been exercised. What exercise of discretion was necessary if the petitioners had not made a *prima facie* showing of eligi-

bility for suspension? In such cases no exercise of discretion is necessary because the petitioner is precluded from suspension of deportation as a matter of law.

It is submitted that the decisions referred to did not turn on the question of whether the petitioners therein were *eligible* for suspension of deportation, but rather were decided upon the courts' rulings that, apart from the question of eligibility, the Board of Immigration Appeals could and did refuse to exercise its authority to suspend deportation. Reference to the decisions indicates such to be the holding of the courts:

"We agree with this statement of the district judge: 'As I read the record, relator's applications were refused not because the Board had no power to grant the application, nor because it found that relator had not proved good moral character for five years previous, nor because she failed to prove seven years' residence in the United States * * * *In other words, the Board, while admitting that relator was qualified to ask for the relief, exercised its discretion and ruled against her.*'" (Emphasis supplied.) *United States ex rel. Adel v. Shaughnessy*, 183 F. 2d 371, 372 (C.A. 2, 1950).

In *United States ex rel. James v. Shaughnessy*, 202 F. 2d 519 (C.A. 2, 1953), a special inquiry officer found the respondent therein "eligible for the privilege of suspension of deportation," but nevertheless had recommended deportation. The Commissioner

of Immigration subsequently denied suspension of deportation, and respondent petitioned for a writ of habeas corpus. In its decision affirming the district court's order denying the writ, the Court stated:

"On the contrary, it is abundantly clear that he has been given administrative consideration of his application on the basis of individual merit, or the lack of it, with recognition of his right to make the application. As the opinion of the Board of Appeals disclosed, its decision was an actual exercise of discretion in the light of 'respondent's own statements and other evidence of record'."

In *Kavadias v. Cross*, 82 F. Supp. 716 (reversed on other grounds 177 F. 2d 497 (C.A. 7, 1949)) the district court held that the action of the Board in denying the petitioner's application for suspension was not arbitrary in view of the fact that the petitioner therein had not proved good moral character during the five years preceding his application for suspension of deportation, a prerequisite to eligibility under the statute there under consideration. In relation to the application for suspension, the Court observed:

"In considering these questions, emphasis must be placed upon the fact that a deportation hearing had been afforded the petitioner before he applied for a suspension under § 155(c). Of course, he was not in a position in 1941, when the hearing was conducted, to apply for such a suspension. And as a result of that hearing, a deportation order was issued and was unexecuted and outstanding against him for more than five

years before the petitioner created the situation which qualified him to make an application for a suspension of the order. *In other words, his deportation status had already been fixed in accordance with existing administrative procedure long before he became entitled to make an application for a suspension.* It would thus appear that the regulations governing the procedure to be followed by the Immigration Service Inspector in deportation proceedings, as regards suspensions under § 155 (c), could not and need not have been observed in this case. Indeed, the petitioner himself recognized this by the filing of his motion with the Board of Immigration Appeals to 'reopen and reconsider' his deportation order.

"But regardless of this, it would seem that the Board of Immigration Appeals would necessarily have to consider this motion and exercise the discretion allowed in suspension applications 'honestly and in good faith and not arbitrarily or capriciously.' *United States ex rel. Weddeke v. Watkins, supra.*" (Emphasis supplied.)

Appellee submits that a fair analysis of the cited decisions, *supra*, necessitates the conclusion that due process does not require a hearing upon the issue of suspension of deportation, *regardless of the question of eligibility*, where, as here, there are no regulations directing the manner in which an application for suspension of deportation can be made or considered. Two additional cases relied upon by appellee in the court below (R. 8, pp. 2, 3), which are not discussed in appellant's brief, clearly demonstrate the validity of this interpretation *Arakas v. Zimmerman*, 200 F. 2d 322

(C.A. 3, 1952), and *United States ex rel. Kaloudis v. Shaughnessy*, 180 F. 2d 489 (C.A. 2, 1950) both are cases in which applications for suspension of deportation were denied without a hearing on the issue, although it was conceded that the applicants were eligible for such relief. In the *Kaloudis* case, *supra*, Judge Learned Hand, for the Court, stated:

“The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate. The relator does not challenge the test here applied, so far as concerns the deportation order itself; he agrees that, so far as his interest in residing in this country was protected by statute—in so far as it was ‘a legally protected interest’—it had been forfeited. *His position is that, being concededly eligible for suspension of deportation, he was entitled to the exercise of the Attorney General’s discretion, and that it appears that this has not been in fact exercised in accordance with the limitations, which must be assumed to confine it.* Unless he is to be permitted a hearing to show that it has not been so exercised, he says that he will be denied ‘due process of law.’ It does not appear from the record that the Attorney General—through the Board, his delegate—has exercised his discretion in disregard of any implied limitations. We will assume *arguendo* that the contrary might appear: *i.e.*, that the reason given might be so clearly irrelevant that a court could say that the Attorney General had transgressed the statute. Suppose, for example, that he denied suspension because the alien had

become too addicted to attending baseball games, or had bad table manners. But membership, even past membership, in an organization which the Attorney General has 'proscribed' may make an alien's continued residence prejudicial to the public weal. True, without an inquiry we cannot know whether membership in the 'Order' is prejudicial; for we cannot tell whether the Attorney General had adequate grounds for 'proscribing' it. On the other hand we cannot say that he did not; and, if the relator has the privilege of inquiring into the grounds, he has been wronged, and the writ should have gone. An alien has no such privilege; unless the ground stated is on its face insufficient, he must accept the decision, for it was made in the 'exercise of discretion,' which we have again and again declared that we will not review." (Emphasis supplied.)

In the subject case, appellant submitted her motion to reopen the deportation proceedings to the Board of Immigration Appeals. Such procedure is provided for in Title 8, Code of Federal Regulations, Part 6.2. Title 8, Code of Federal Regulations, Part 6.1(d) provides as follows:

"Powers of the Board—(1) Generally. Subject to any specific limitation prescribed by this chapter, in considering and determining cases before it as provided in this part the Board shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case, except that the Board shall have no authority to consider or determine the manner, at whose expense, or to which country an alien shall be deported. (Emphasis supplied.)"

Under the authority set forth in Part 6.1(d) the Board of Immigration Appeals properly exercised the discretion of the Attorney General in denying the motion to reopen, and likewise determined the issue of suspension of deportation in so acting. A hearing on the issue of suspension of deportation was unnecessary, inasmuch as neither the statute nor the regulations provide for a hearing on such application where the deportation hearing was concluded prior to the enactment of the statute providing the authority for applying for suspension of deportation.

CONCLUSION

Appellant, concededly deportable under a valid order of deportation, has received full consideration upon the issue of suspension of deportation. A decision, adverse to her, was made without a hearing upon the issue, after an overall evaluation of the facts and circumstances revealed by the motion to reopen the deportation hearing as well as the record already before the Board of Immigration Appeals on the earlier proceeding. Such decision constituted an exercise of discretion of the Attorney General or his authorized delegate, the Board of Immigration Appeals, under the provisions of the Immigration and Nationality Act of 1952. A hearing on the issue of suspension of deportation was unnecessary because neither the statute

nor the regulations promulgated thereunder provide for a hearing on that issue in cases where, as here, the deportation hearing was concluded prior to the time when Congress authorized suspension of deportation for persons occupying the status which appellant claims.

For the above reasons, it is respectfully urged that the decision of the court below be affirmed.

Respectfully submitted,

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No. 15102

United States
Court of Appeals
for the Ninth Circuit

THE CANADA LIFE ASSURANCE COM-
PANY, a Corporation, Appellant,

vs.

CHARLOTTE S. HOUSTON, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

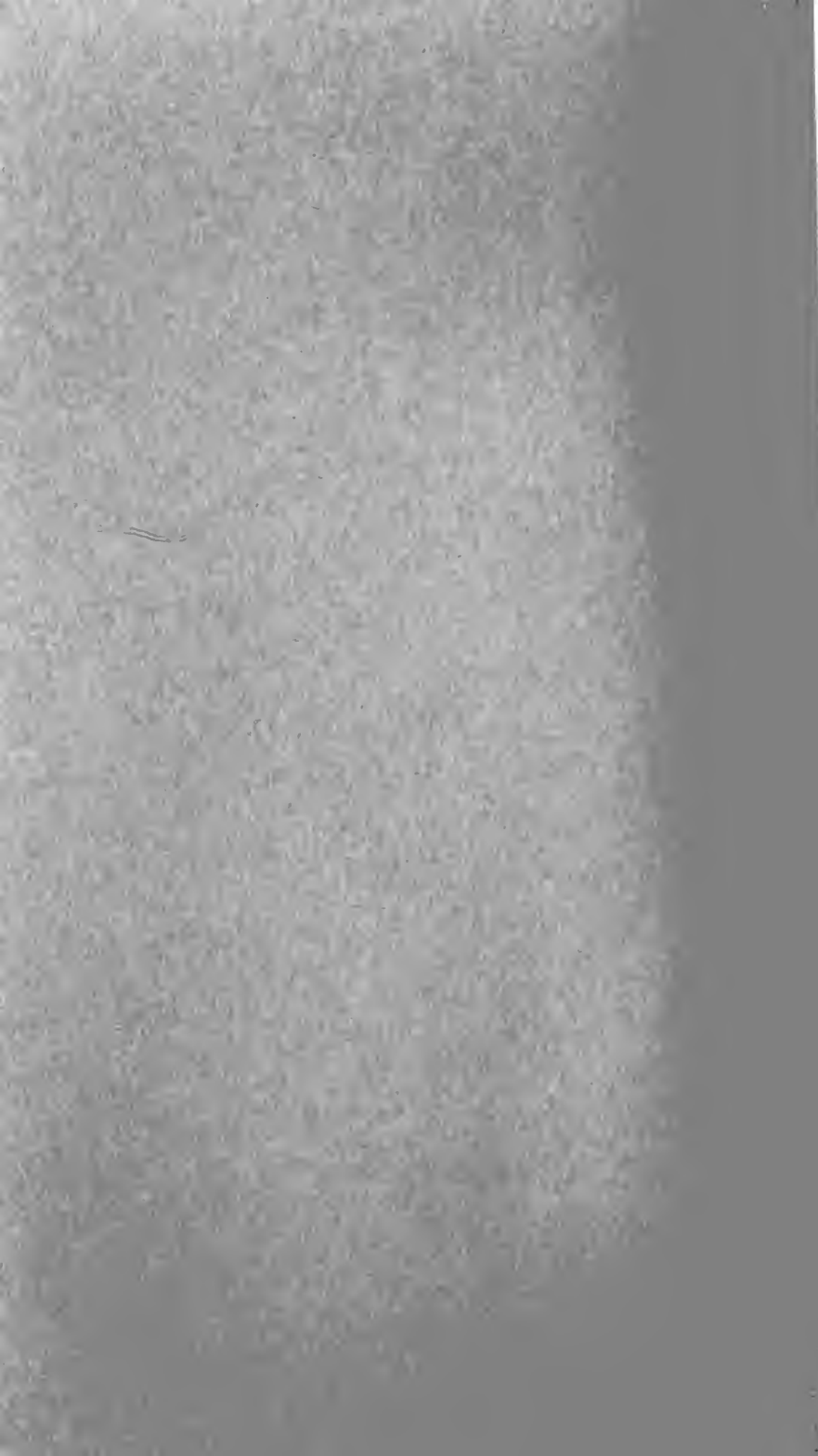
(Pages 1 to 360, inclusive)

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

JUL 25 1956

PAUL P. O'BRIEN, CLERK



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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, 4, California,

Counsel for Appellee.



In the United States District Court for the Northern District of California, Southern Division

No. 34395

CHARLOTTE S. HOUSTON, Plaintiff,

vs.

THE CANADA LIFE ASSURANCE COMPANY, NEW YORK LIFE INSURANCE COMPANY, and JEFFERSON STANDARD LIFE INSURANCE COMPANY,

Defendants.

PETITION FOR REMOVAL

To the Judges of the United States District Court for the Northern District of California, Southern Division:

The petition of The Canada Life Assurance Company respectfully shows:

I.

On the 4th day of January, 1955, an action was commenced against petitioner in the Superior Court of the State of California, in and for the County of Alameda, entitled Charlotte S. Houston, Plaintiff, vs. The Canada Life Assurance Company, New York Life Insurance Company, and Jefferson Standard Life Insurance Company, Defendants, numbered 262581, by the service upon petitioner of a summons and complaint, copies of which are annexed hereto. No further proceedings have been had therein.

II.

The claims of plaintiff against the New York Life Insurance Company and the Jefferson Standard Life Insurance Company are claims and causes of action separate and independent from the claims against petitioner.

III.

The above described action is one which this Court has original jurisdiction under the provisions of Title 28, United States Code, §1332, and is one which may be removed to this Court by petitioner, defendant herein, pursuant to the provisions of Title 28, United States Code, § 1441, in that it is a civil action wherein the matter in controversy exceeds the sum or value of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs, and is between citizens of different states.

IV.

Petitioner is informed and believes and therefore alleges that plaintiff, Charlotte S. Houston, at the time this action was commenced, was and still is a citizen of the State of California, and defendant The Canada Life Assurance Company, at the time this action was commenced was and still is a corporation incorporated under the laws of Canada, and was not and is not incorporated under the laws of the State of California, and defendant New York Life Insurance Company, at the time this action was commenced was and still is a corporation incorporated under the laws of the State of New York, and was not and is not incorporated un-

der the laws of the State of California, and defendant Jefferson Standard Life Insurance Company, at the time this action was commenced was and still is a corporation incorporated under the laws of the State of North Carolina, and was not and is not incorporated under the laws of the State of California.

V.

Your petitioner herein files and presents herewith a bond with good and sufficient surety in the penal sum of Two Hundred Fifty Dollars (\$250.00) conditioned as required by Acts of Congress on that behalf duly made and provided, that petitioner will pay all costs and disbursements incurred by reason of the removal proceeding should it be determined that this case is not removable or is improperly removed.

Wherefore, your petitioner prays that this cause proceed in this Court as an action properly removed thereto.

KEESLING & KEESLING,
HENRY C. CLAUSEN,
/s/ By HENRY C. CLAUSEN,
Attorneys for Petitioner

Duly Verified.

Superior Court of the State of California in and
for the County of Alameda

Action No. 262581

Charlotte S. Houston, Plaintiff, vs. The Canada
Life Assurance Company, New York Life In-
surance Company, and Jefferson Standard Life
Insurance Company, Defendants.

SUMMONS

The People of the State of California to The Can-
ada Life Assurance Company, New York Life
Insurance Company, and Jefferson Standard
Life Insurance Company, Defendants:

You are hereby directed to appear and answer
the complaint filed in the County of Alameda in an
action entitled as above, brought against you in the
Superior Court of the State of California in and
for the County of Alameda, within ten days after
the service on you of this summons—if served
within said County, or within thirty days if served
elsewhere.

You are hereby notified that unless you appear
and answer as above required, the said plaintiff will
take judgment for any money or damages demanded
in the complaint as arising upon contract, or will
apply to the Court for any other relief demanded
in the complaint.

Witness my hand and the seal of the Superior

Court of the State of California in and for the
County of Alameda this 4th day of January, 1955.

[Seal]

Jack G. Blue, Clerk
By Eugene J. Donlon, Deputy
Angell and Adams,
Attorneys for Plaintiff

Served on Walsh, Asst. Secy & Legal Officer
1/12/54.

[Title of Superior Court and Cause No. 262581]

COMPLAINT UPON LIFE INSURANCE CONTRACTS

Comes now plaintiff above named and for a first
cause of action alleges:

I.

Plaintiff at all times herein mentioned has been
and now is a resident of the County of Alameda,
State of California, and is the widow of William
M. Houston, also known as William Mark Houston.

II.

Prior to February 22, 1954 said William M.
Houston was a resident of the City of Berkeley,
County of Alameda, State of California. On Feb-
ruary 22, 1954 said William M. Houston died at his
residence in said city and county as a result, di-
rectly and independently of all other causes, of
bodily injury effected solely through external, vio-
lent and accidental cause, to-wit, the accidental dis-
charge of a rifle being carried by said decedent.

III.

On February 22, 1954, said decedent was the named insured of a certain policy of life insurance issued by defendant, The Canada Life Assurance Company, No. 1,003,546, issued as of November 3, 1953 in the face amount of \$10,000.00, subject to family income provision therein contained. At the date of issue of said policy, to-wit, November 3, 1953 said William M. Houston, named insured therein, was a resident of the City of Berkeley, County of Alameda, State of California. All premiums payable by the insured under the terms of said policy to February 22, 1954 have been paid. Plaintiff is the named beneficiary of said life insurance policy and there are no loans or other indebtedness payable to said defendant pursuant to or secured by said policy. Plaintiff has submitted to said defendant, The Canada Life Assurance Company, due proof of decedent's death from accidental cause in compliance with all requirements of said policy.

IV.

Under said family income provision attached to and made a part of said policy No. 1,003,546, issued by said defendant The Canada Life Assurance Company, plaintiff is entitled to receive a guaranteed income of \$200.00 per month, commencing February 22, 1954 and thereafter a like sum on the same day of each month to and including September 24, 1963, together with the sum of \$10,000.00 on September 24, 1963. Said plaintiff further has the right under said policy to elect to commute said monthly pay-

ments and receive a commuted value determined as set forth in said policy. The commuted value of said policy is approximately the sum of \$27,390.00.

V.

Defendant, The Canada Life Assurance Company, has refused to pay plaintiff the amounts payable to plaintiff under and pursuant to the terms of said policy except only the amount of premiums heretofore paid by said decedent thereunder and said defendant disclaims any other or further liability thereunder.

Wherefore, plaintiff prays judgment as hereinafter set forth.

As and for a second cause of action, plaintiff alleges as follows:

I.

Plaintiff hereby incorporates the allegations of Paragraphs I and II of the first cause of action to the same extent as though set forth in full herein.

II.

On February 22, 1954, said decedent was the named insured of two life insurance policies issued by defendant New York Life Insurance Company, as follows, to-wit:

1. Policy No. 6,851,866, issued November 3, 1920, in the face amount of \$2,000.00; and
2. Policy No. 6,851,867, issued November 3, 1920, in the face amount of \$3,000.00.

Each of said policies provide for the payment

to the beneficiary thereof of double the face amount of such policy upon receipt of due proof that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause.

III.

All premiums payable under said policies of defendant New York Life Insurance Company from the date of issue to February 22, 1954 have been paid and there are no loans or other indebtedness payable to said defendant pursuant to or secured by said policies, or either of them. Plaintiff is the named beneficiary of each of said policies. Plaintiff has submitted to said defendant New York Life Insurance Company due proof of decedent's death from accidental cause in compliance with all requirements of each of said policies.

IV.

Defendant, New York Life Insurance Company, has acknowledged liability and has paid or agreed to pay to plaintiff the face amount of each of said policies under and pursuant to the terms thereof, but has refused to pay and disclaims all liability under the double indemnity provisions of each of said policies.

Wherefore, plaintiff prays judgment as hereinafter set forth.

As and for a third cause of action, plaintiff alleges as follows:

I.

Plaintiff hereby incorporates the allegations of Paragraphs I and II of the first cause of action to the same extent as though set forth in full herein.

II.

On February 22, 1954, said decedent was the named insured of a policy of life insurance issued by defendant, Jefferson Standard Life Insurance Company, Policy No. 269,415, issued March 29, 1926 in the face amount of \$5,000.00, which said policy contains an undertaking by defendant, Jefferson Standard Life Insurance Company, to pay double the face amount of said policy if the death of the insured results directly and independently of all other causes, from bodily injury, effected solely through external, violent, and accidental means.

III.

All premiums payable under said policy of defendant, Jefferson Standard Life Insurance Company, from the date of issue to February 22, 1954 have been paid and there are no loans or other indebtedness payable to said defendant pursuant to or secured by said policy. Plaintiff is the named beneficiary under said policy. Plaintiff has submitted to said defendant, Jefferson Standard Life Insurance Company, due proof of decedent's death from accidental cause in compliance with all requirements of said policy.

IV.

Defendant, Jefferson Standard Life Insurance Company, has acknowledged liability and has paid or agreed to pay to plaintiff the face amount of said policy, but has refused to pay the amount payable to said beneficiary by reason of the double indemnity provision of said policy.

Wherefore, plaintiff prays judgment as hereinafter set forth.

Wherefore, plaintiff prays judgment, as follows:

(1) Upon the first cause of action against defendant, The Canada Life Assurance Company, the sum of \$27,390.00, being the commuted value of said policy on February 22, 1954, together with interest thereon at the rate of 7% per annum from February 22, 1954 to date of judgment.

(2) Upon the second cause of action against defendant, New York Life Insurance Company, the sum of \$5,000.00, together with any and all other sums payable under and pursuant to said policies by reason of the double indemnity provision therein contained, together with interest on said total sum at the rate of 7% per annum from February 22, 1954 to date of judgment.

(3) Upon the third cause of action against defendant, Jefferson Standard Life Insurance Company, in the sum of \$5,000.00, together with any and all other sums payable under and pursuant to said policy by reason of the double indemnity provision therein contained, together with interest on

said sum at the rate of 7% per annum from February 22, 1954 to date of judgment.

(4) Against all of said defendants, for plaintiff's costs of suit herein incurred.

(5) Against all of said defendants, for such other and further relief as to the Court seems just.

Dated: December 16, 1954.

Angell and Adams,
/s/ By Robert M. Adams, Jr.,
Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed Jan. 14, 1955.

[Title of Superior Court and Cause No. 34395.]

BOND ON REMOVAL

Know All Men By These Presents:

That we, The Canada Life Assurance Company, New York Life Insurance Company and Jefferson Standard Life Insurance Company, Defendants in the above entitled suit, as Principal, and Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, as Surety, are held and firmly bound unto Charlotte S. Houston, Plaintiff, above named, in the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, lawful money of the *United*, for the payment whereof, well and truly to be made, we hereby bind ourselves, our heirs, executors, successors and assigns, jointly and severally by these presents.

The Condition Of This Obligation Is Such, that whereas the said Principal has filed, or is about to file their petition in the Superior Court of the State of California in and for the County of Alameda, praying for the removal of a certain cause therein pending, as above entitled, wherein Charlotte S. Houston is the Plaintiff and the said Principal is the defendants to the Southern Division of the United States District Court for the Northern District of California.

Now, Therefore, if the said Principal shall enter in the said United States District Court, within thirty (30) days from the date of filing their said petition for removal, a certified copy of the record in said suit, and also shall appear therein, and shall well and truly pay all costs that may be awarded by the said United States District Court if said Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In Witness Whereof the Fidelity and Deposit Company of Maryland has caused these presents to be executed this 14th day of January, 1955.

[Seal]

Fidelity and Deposit Company of
Maryland,

/s/ By Erbon Delventhal,
Attorney-in-fact

Notary Public Certificate attached.

[Endorsed]: Filed January 14, 1955.

[Title of District Court and Cause.]

PETITION OF DEFENDANTS JEFFERSON
STANDARD LIFE INSURANCE COM-
PANY, A CORPORATION, AND NEW
YORK LIFE INSURANCE COMPANY, A
CORPORATION, FOR REMOVAL OF
CAUSE TO THE UNITED STATES DIS-
TRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION

To the Honorable, The United States District
Court for the Northern District of California,
Southern Division:

Your petitioners, Jefferson Standard Life Insur-
ance Company, a corporation, and New York Life
Insurance Company, a corporation, defendants in
the above-entitled action, respectfully show to the
Honorable Court:

I.

That the above-entitled action was heretofore
brought and is now pending in the Superior Court
of the State of California, in and for the County
of Alameda, and is numbered 262581 in the records
and files of said court.

II.

That copy of summons and complaint in said
action were received by each petitioner herein on
or later than the 4th day of January, 1955.

III.

That the above-entitled cause is a civil action, to wit, an action to recover benefits under policies of life insurance therein described. That the matter therein in controversy exceeds the sum of **Three Thousand Dollars** (\$3,000), exclusive of interest and costs.

IV.

That said action is between citizens of different states.

V.

That plaintiff Charlotte S. Houston was at the time of commencement of said action and ever since has been and now is a citizen of the United States of America and a citizen, resident and inhabitant of the State of California.

VI.

That defendant, The Canada Life Assurance Company, was at the time of the commencement of said action and ever since has been and now is an alien corporation organized and existing under and by virtue of the laws of the Dominion of Canada and was not at any of said times and is not now a citizen, resident or inhabitant of the State of California.

VII.

That defendant, New York Life Insurance Company, a corporation, was at the time of the commencement of said action and ever since has been and now is a corporation duly organized and existing under and by virtue of the laws of the State

of New York and a citizen, resident and inhabitant of the State of New York and was not at any of said times and is not now a citizen, resident or inhabitant of the State of California.

VIII.

That defendant, Jefferson Standard Life Insurance Company, a corporation, was at the time of the commencement of said action and ever since has been and now is a corporation duly organized and existing under and by virtue of the laws of the State of North Carolina and a citizen, resident and inhabitant of the State of North Carolina and was not at any of said times and is not now a citizen, resident or inhabitant of the State of California.

IX.

That your petitioners have not filed any pleading or otherwise appeared in said action and desire to remove the same, before any proceedings are taken therein, into the United States District Court for the Northern District of California, Southern Division, said Court being the District Court of the United States for the district and division within which such action is pending.

X.

That your petitioners offer and file herein a bond with good and sufficient surety, conditioned that they will pay all costs and disbursements incurred by reason of the removal proceedings should it be

Now, Therefore, if said Jefferson Standard Life Insurance Company, a corporation, and New York Life Insurance Company, a corporation, shall pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, the undersigned has caused these presents to be executed by its lawful representative thereunto duly authorized this 17th day of January, 1955.

[Seal] FIREMAN'S FUND INDEMNITY
COMPANY, a corporation,
/s/ By A. J. CLEFFI,
Its Attorney-in-Fact

Notary Public Certificate attached.

[Endorsed]: Filed January 18, 1955.

[Title of District Court and Cause.]

BOND FOR SECURITY FOR COSTS

Know All Men By These Presents:

That the undersigned, Fireman's Fund Indemnity Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, as surety, is held and firmly bound unto the Clerk, Marshal or other officer of the above entitled court, and unto Charlotte S. Houston,

plaintiff in the above entitled action, in the sum of Two Hundred Fifty Dollars (\$250), lawful money of the United States of America, for payment of which sum well and truly to be made the undersigned does bind itself, its successors and assigns, jointly and severally, firmly by these presents.

The conditions of this obligation are such that:

Whereas, Jefferson Standard Life Insurance Company, a corporation, and New York Life Insurance Company, a corporation, defendants in said action, have filed or are about to file a petition in the United States District Court for the Northern District of California, Southern Division, for the removal of said action from the Superior Court of the State of California, in and for the County of Alameda, into the said United States District Court;

Now, Therefore, if said Jefferson Standard Life Insurance Company, a corporation, and New York Life Insurance Company, a corporation, shall pay all fees in this action which they must by law pay to the Clerk, Marshal or other officer of the above entitled court, and all costs in this action which they may ultimately be required to pay to plaintiff, Charlotte S. Houston, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, the undersigned has caused these presents to be executed by its lawful repre-

sentative thereunto duly authorized this 17th day of January, 1955.

[Seal] FIREMAN'S FUND INDEMNITY
COMPANY, a corporation,
/s/ By A. J. CLEFFI,
Its Attorney-in-Fact

Notary Public Certificate attached.

[Endorsed]: Filed January 18, 1955.

[Title of District Court and Cause.]

NOTICE OF ASSOCIATION OF ATTORNEYS
To Plaintiff Aove Named and to Angell & Adams,
Her Attorneys:

You and each of you will please take notice that defendant Jefferson Standard Life Insurance Company, hereby associates Bledsoe, Smith & Cathcart, 315 Montgomery Street, San Francisco, California, with the undersigned, as attorneys for said defendant.

/s/ KEESLING & KEESLING,

We hereby accept the foregoing association.

/s/ BLEDSOE, SMITH & CATHCART

Dated: January 24, 1955.

[Endorsed]: Filed January 27, 1955.

[Title of District Court and Cause.]

**ANSWER OF DEFENDANT NEW YORK
LIFE INSURANCE COMPANY**

Comes now one of the above named defendants, New York Life Insurance Company, a corporation, hereinafter referred to as "the Company", and as and for its separate answer to the complaint on file herein, admits, denies and alleges as follows:

**Answer to the Second Alleged Cause of Action in
Plaintiff's Complaint**

I.

Answering paragraph I of plaintiff's second alleged cause of action, the Company admits that at all times mentioned in the complaint on file herein plaintiff was, and still is a resident of the County of Alameda, State of California, and that plaintiff is the widow of William M. Houston, also known as William Mark Houston. The Company further admits that prior to February 22, 1954, said William M. Houston was a resident of the City of Berkeley, County of Alameda, State of California and that on or about February 22, 1954, said William M. Houston died at his residence in said city and county. Except as expressly admitted in this paragraph, the Company denies each and every, all and singular, the allegations of said paragraph I.

II.

Answering paragraph II of plaintiff's second alleged cause of action, the Company admits that on

or about the 3rd day of November, 1920, it issued its policy of life insurance numbered 6,851,866 to and on the life of said William M. Houston in the face amount of \$2,000.00. A full, true and correct copy of said policy of life insurance is annexed hereto, marked Exhibit "A", and is hereby made a part of this answer as fully as though here set forth at length. The Company admits that on or about the 3rd day of November, 1920, it issued its policy of life insurance numbered 6,851,867 to and on the life of said William M. Houston in the face amount of \$3,000.00. A full, true and correct copy of said policy of life insurance is annexed hereto, marked Exhibit "B", and is hereby made a part of this answer as fully as though here set forth at length. The Company relies upon each of said policies of life insurance and upon each and every provision contained therein. Except as expressly admitted or alleged in this paragraph, the Company denies each and every, all and singular, the allegations of said paragraph II.

III.

Answering paragraph III of plaintiff's second alleged cause of action, the Company admits the allegations of said paragraph III except the allegation that plaintiff has submitted to the Company due proof of decedent's death from accidental cause in compliance with all requirements of each of said policies. The Company denies that plaintiff has submitted to it due proof, or any proof at all, of decedent's death from accidental cause, as re-

quired by each of said policies of life insurance. The Company alleges that plaintiff has not furnished it due proof, or any proof at all, that the death of said William M. Houston resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause, and that such death occurred within sixty days after sustaining such injury; as required by each of said policies of life insurance.

IV.

Answering paragraph IV of plaintiff's second alleged cause of action, the Company admits that it has paid or agreed to pay plaintiff the face amount of each of said policies of life insurance and that it has refused to pay and disclaims all liability under the double indemnity provisions of each of said policies.

V.

As and for a separate defense to plaintiff's second alleged cause of action, the Company affirmatively alleges that the death of said insured, William M. Houston, resulted from self destruction.

VI.

As and for a further and separate defense to plaintiff's second alleged cause of action, the Company affirmatively alleges that the death of said insured, William M. Houston, resulted from physical or mental infirmity or from illness or disease.

Answer to the First Alleged Cause of Action in
Plaintiff's Complaint

I.

Answering paragraphs I and II of plaintiff's first alleged cause of action, the Company here repeats, as fully as though here set forth at length, the allegations of paragraph I of its answer to plaintiff's second alleged cause of action.

II.

Answering paragraphs III, IV and V of plaintiff's first alleged cause of action, the Company alleges that it has no information or belief concerning the allegations of said paragraphs III, IV and V and, placing its denial upon that ground, denies each and every, all and singular, the allegations of said paragraphs III, IV and V.

Answer to the Third Alleged Cause of Action in
Plaintiff's Complaint

I.

Answering paragraph I of plaintiff's third alleged cause of action, the Company here repeats, as fully as though here set forth at length, the allegations of paragraph I of the answer to plaintiff's second alleged cause of action.

II.

Answering paragraphs II, III and IV of plaintiff's third alleged cause of action, the Company alleges that it has no information or belief concerning the allegations of said paragraphs II, III

and IV and, placing its denial upon that ground, denies each and every, all and singular, the allegations of said paragraphs II, III and IV.

Wherefore, this answering defendant, New York Life Insurance Company, prays that plaintiff take nothing from it by her complaint herein; that said defendant be dismissed with its costs of suit herein incurred; and that said defendant have such other, further and different relief as to this Court shall seem meet and proper in the premises.

/s/ MORRIS M. DOYLE,

/s/ E. M. MANNON,

/s/ McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE

Attorneys for Defendant, New York Life Insurance Company

Acknowledgment of Service attached.

[Endorsed]: Filed March 10, 1955.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT JEFFERSON STANDARD LIFE INSURANCE COMPANY

Defendant Jefferson Standard Life Insurance Company, in answer to the third cause of action set forth in the complaint admits, denies and alleges as follows:

I.

Respecting the allegations incorporated by refer-

ence in Paragraph I thereof, defendant admits that plaintiff at all times mentioned in the complaint has been and now is a resident of the County of Alameda, State of California, and is the widow of William M. Houston, also known as William Mark Houston; defendant admits that said William M. Houston on and prior to February 22, 1954 resided in the City of Berkeley, County of Alameda, State of California and admits that he died at his residence in said City and County on February 22, 1954; defendant alleges that it does not have sufficient information or belief to enable it to answer the allegation incorporated by reference in said Paragraph I of third alleged cause of action that said William M. Houston died at his residence in said City and County as a result, directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental causes, to wit, the accidental discharge of a rifle being carried by said decedent, and basing its denial on such lack of information or belief, defendant denies said allegations; in this behalf defendant further alleges that it is informed and believes and on such information and belief alleges that the death of said William M. Houston resulted from self-destruction.

II.

Defendant admits the allegations contained in Paragraph II of the third alleged cause of action.

III.

Respecting the allegations contained in Para-

graph III of the third alleged cause of action, defendant admits all of the allegations therein contained except that defendant denies that plaintiff has submitted to defendant due or any proof of decedent's death from accidental cause in compliance with all or any of the requirements of said policy of insurance or otherwise.

IV.

Respecting the allegations contained in Paragraph IV of the third alleged cause of action, defendant admits that it has acknowledged liability for and has paid to plaintiff the face amount only of said insurance policy; defendant denies that any sums in excess of the face amount of said policy (i.e. any sums in excess of \$5000.00) are payable to or for the account of plaintiff either under the double indemnity provision of said policy or otherwise.

For a Further, Separate and Affirmative Defense, defendant alleges as follows:

I.

On or about March 29, 1926 defendant issued its policy of life insurance number 269415 to William M. Houston in the face amount of Five Thousand and no/100ths Dollars (\$5000.00); under and by the terms of said policy defendant engaged to pay to the beneficiary named therein the sum of Five Thousand and no/100ths Dollars (\$5000.00) on the death of said William M. Houston; in and by said policy of insurance it was further provided that

if the death of the insured therein named resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, defendant would pay double the face amount of the policy on account of the death of the insured; in and by said policy of insurance it was further provided that the afore-said double indemnity provision thereof should not apply if the death of the named insured resulted from self-destruction;

II.

Defendant has heretofore paid to plaintiff as the beneficiary named in said insurance policy the full face amount of the policy of insurance hereinabove referred to in the total amount of Five Thousand and no/100ths Dollars (\$5000.00); defendant is informed and believes and upon such information and belief alleges that the death of said William M. Houston on or about February 22, 1954, resulted from self-destruction, by reason whereof no double indemnity benefits are payable by or under the terms of said policy of insurance.

As a Second, Separate and Affirmative Defense, defendant alleges that all sums payable by defendant to plaintiff, on account of the death of said William M. Houston or otherwise, have been paid.

Wherefore, defendant prays judgment that plaintiff take nothing by reason of her complaint on file herein and that the same be dismissed; for defendant's costs of suit herein incurred and for such

other and further relief as to the court may seem proper.

/s/ WILLIAM H. KEESLING,

/s/ BLEDSOE, SMITH, CATHCART &
PHELPS,

Attorneys for Defendant Jefferson Standard Life
Insurance Company

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed March 24, 1955.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT THE CANADA
LIFE ASSURANCE COMPANY

Comes now one of the above named defendants, The Canada Life Assurance Company, a corporation, and as and for its separate answer to the complaint on file herein, admits, denies and alleges as follows:

Answer to the First Alleged Cause of Action

I.

Answering paragraph I of plaintiff's first alleged cause of action, this defendant admits the allegations therein contained.

II.

Answering paragraph II of plaintiff's first alleged cause of action, this defendant admits that prior to February 22, 1954, William M. Houston

was a resident of the City of Berkeley, County of Alameda, State of California; this defendant further admits that on February 22, 1954, said William M. Houston died at his residence in said City and County; except as expressly admitted in this paragraph, this defendant denies each and every, all and singular the remaining allegations of said paragraph II; defendant alleges that the death of William M. Houston resulted from suicide.

III.

Answering paragraph III of plaintiff's first alleged cause of action, this answering defendant admits that on February 22, 1954, said decedent was the named insured in a certain policy of life insurance issued by defendant, The Canada Life Assurance Company, numbered 1,003,546, issued as of November 3, 1953, in the face amount of \$10,000.00, subject to family income provisions therein contained. A full true and correct copy of the policy of life insurance is annexed hereto, marked Exhibit "A", and is hereby made a part of this answer as fully as though herein set forth at length. This defendant further admits that at the date of issuance of said policy, to wit, November 3, 1953, said William M. Houston, the named insured therein, was a resident of the City of Berkeley, County of Alameda, State of California. This defendant further admits that all premiums payable by the insured under the terms of said policy to February 22, 1954 have been paid. This defendant admits that plaintiff is the named beneficiary of said life

insurance policy, and admits that there are no loans or other indebtedness payable to this defendant pursuant to or secured by said policy. This defendant denies that plaintiff has submitted to defendant due or any proof of decedent's death from accidental cause in compliance with the requirements of said policy.

IV.

Answering paragraph IV of plaintiff's first alleged cause of action, this defendant denies each and every, all and singular the allegations therein contained. This defendant further alleges that the commuted value under said policy is \$28,552.00 as of February 22, 1954, but denies that plaintiff has any rights thereto.

V.

Answering paragraph V of plaintiff's first alleged cause of action, this defendant admits that it has refused to pay to plaintiff the amounts claimed by plaintiff and admits that this defendant disclaims any liability under said policy, except only to pay to plaintiff the amounts heretofore paid by decedent thereunder. In this connection, this defendant alleges that it has tendered to plaintiff the sum of \$382.70 to the person entitled thereto but that said person has refused to accept said sum and that this defendant is ready, willing and able to pay said sum to the person entitled thereto.

First Affirmative Defense

For a first, separate and affirmative defense, this defendant alleges:

I.

That the written application for life insurance of William Mark Houston to this defendant, dated September 24, 1953, did contain as a part thereof, answers to the medical examiner.

II.

That under and by virtue of said written application for life insurance, it was represented and stated, among other things, by the said William Mark Houston, for the purpose of inducing this defendant Company to issue a policy and contract of life insurance on the life of the said William Mark Houston, that the said William Mark Houston used alcoholic stimulants only "socially" and only "occasionally", and never used alcoholic stimulants to excess.

III.

That relying upon the said representations and statements contained in said application and induced thereby, and not otherwise, this defendant on November 3, 1953 did issue its contract and policy of life insurance on the life of said William Mark Houston, but in this regard this defendant alleges that the provisions of said contract and policy of life insurance never took effect; that the representations made by the said William Mark Houston in said application were false and fraudulent; that the said William Mark Houston did in fact use alcoholic stimulants daily or almost daily, and did in fact on many occasions use alcoholic stimulants to excess.

IV.

That this defendant relied solely on the representations and statements made in the application of William Mark Houston to this defendant for life insurance, and said defendant did believe said answers and statements in said application to be true at the time of issuing of said policy, and this defendant had no information or reason to believe at the time of the issuing of said policy, or at the time of the delivery thereof, that all of said statements in said application were untrue; that said representations and statements were known to said William Mark Houston at the time the same were made to be untrue and false and were made for the purpose of inducing this defendant to issue a policy and contract upon the life of said William Mark Houston; that said representations and each of them was material to the risk of this defendant in issuing its policy of insurance in that this defendant would not have issued its policy of insurance had it known that said representations were false or untrue.

V.

That this defendant had no knowledge of the falsity of said representations or of the matters concealed by said William Mark Houston, relating to his condition of health at the time of making said application for said policy and contract of insurance, until after the receipt by it of the documents purporting to be the Proofs of Death when in the course of an investigation surrounding the said alleged Proofs of Death furnished to this de-

fendant by plaintiff it discovered the same. By these presents this defendant rescinds and repudiates said policy of insurance and offers to return and hereby tenders to plaintiff all premiums paid on account of said policy of insurance; this defendant now is ready, willing and able to return said premiums paid on said policy of insurance and offers to deposit with the Clerk of Court the amount of premiums herein tendered to plaintiff.

Second Affirmative Defense

For a second, separate and affirmative defense, this defendant alleges:

I.

That Policy No. 1,003,546 issued as of November 3, 1953 in the face amount of \$10,000.00, subject to the family income provisions therein contained, a full true and correct copy of which is annexed hereto, marked Exhibit "A", and issued upon the life of William H. Houston, naming plaintiff beneficiary thereunder, provides in part as follows:

"Suicide. During the first two years from the date of issue of this policy, suicide (whether the assured be sane or insane) is a risk not assumed under this policy; should death occur in such manner that the assurance is not effective because of the operation of this provision, the Company will pay an amount equal to the premiums paid under this policy, which amount will be paid in one sum to the person or persons who would have been entitled to the net proceeds of this policy or the first

payment therefrom had this policy matured by reason of the assured's death."

II.

That the family income provision attached to and made a part of the said policy No. 1,003,546, provides in part as follows:

"Exception. This provision will be inoperative in the event that the assured's death occurs under such circumstances that the payment provided for in the Suicide provision becomes payable."

III.

That the death of said William M. Houston on or about February 22, 1954 resulted from suicide, by reason whereof under the above provisions of the said policy and family income provision no benefits are payable by or under the terms of said policy of insurance.

IV.

That on or about July 13, 1954, this defendant tendered to plaintiff the sum of \$382.70, pursuant to the terms of the above mentioned suicide clause in said policy but plaintiff has refused to accept such sum; this defendant is ready, willing and able to pay said sum to plaintiff or to any other person entitled thereto, and offers to deposit with the Clerk of Court the amount of premiums herein tendered to plaintiff.

Wherefore, this defendant, The Canada Life Assurance Company, prays that plaintiff take nothing

by way of her complaint herein; that this defendant be dismissed with its costs of suit herein incurred; and that this defendant have such other and further relief as to the court may seem proper.

KEESLING & KEESLING,
HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,
/s/ By HENRY C. CLAUSEN, JR.,
Attorneys for Defendant, The Canada Life Assurance Company

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 5, 1955.

[Title of Superior Court and Cause No. 34395.]

NOTICE OF MOTION AND MOTION TO STRIKE DEFENSE FROM ANSWER

To Defendant, The Canada Life Assurance Company, and to Keesling & Keesling and Henry C. Clausen and Henry C. Clausen, Jr., Its Attorneys:

Please take notice that the plaintiff will move the above-entitled Court at the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, at 9:30 o'clock a.m., on the 18th day of April, 1955, or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 12(f), F.R.C.P., striking the First Affirmative Defense from the Answer of defendant, The Canada

Life Assurance Company, on the ground that said defense fails to state a legal defense to the cause of action set forth in plaintiff's complaint herein.

Dated: April 8, 1955.

ANGELL & ADAMS,
/s/ By EDWARD K. ALLISON,
Attorneys for Plaintiff

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Apr. 9, 1955.

[Title of District Court and Cause.]

DISMISSAL OF ACTION AS TO DEFEND-
ANT NEW YORK LIFE INSURANCE
COMPANY

The above entitled action is hereby dismissed with prejudice as to defendant New York Life Insurance Company, each party to pay her or its own costs.

Dated: October 3, 1955.

/s/ EDWARD K. ALLISON,
/s/ ANGELL and ADAMS,
Attorneys for Plaintiff

It Is So Ordered:

/s/ GEORGE B. HARRIS,
United States District Judge

October 5, 1955.

[Endorsed]: Filed October 5, 1955.

[Title of District Court and Cause.]

DISMISSAL

To the Clerk of the Above Entitled Court:

You are hereby directed to dismiss with prejudice the above entitled action as to the defendant, Jefferson Standard Life Insurance Company, said dismissal to operate as a retraxit as to said defendant, Jefferson Standard Life Insurance Company, each party to pay her or its own costs.

/s/ CHARLOTTE S. HOUSTON,
Plaintiff

ANGELL and ADAMS,
s/ By EDWARD K. ALLISON,
Attorneys for Plaintiff

[Endorsed]: Filed October 20, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Roche, Chief Judge:

The plaintiff seeks to recover on a life insurance policy which is dated November 3, 1953, and the defendant defends on two grounds: 1. The policy is voidable because of misrepresentation of material facts in the application; and 2. Because the in-

sured died from a wound which was intentionally self-inflicted with a rifle.¹

The application dated September 24, 1953 contains the following statements:

"I declare that to the best of my knowledge or belief I am at present in good health, not being afflicted with any disease or disorder * * * except as may be disclosed * * * and that the above statements are complete and true."

At the end of the policy is the statement:

"The answers recorded above are as given by me and are complete and true."

In the body of the application the following question and answer appears:

6.(a) "Q. To what extent do you use alcoholic stimulants? A. Yes, socially only occasionally.

(b) Q. Have you ever used them to excess? A. No."

It is defendant's contention that Mr. Houston, the deceased, habitually used alcoholic stimulants, and at times used them to excess. The defendant bears the burden of proving that Mr. Houston made a material misrepresentation in the application for insurance. *Everett vs. Standard Acc. Ins. Co.*, 45 C.A. 332; *Scoles vs. Universal Life Ins. Co.*,

¹ The application for the insurance was made on September 24, 1953. The death occurred February 22, 1954. Under the policy the company would not be liable in the event death occurred by suicide within the first two years. The company, however, would repay the premiums.

42 C. 523; Mickschl vs. The National Council of the Knights & Ladies of Security, 40 C.A. 100.

It is the Court's view that Mr. Houston's answers to the general questions regarding his consumption of alcohol are to be regarded as expressions of insured's opinion and that the questions having been framed by defendant, they are bound by any ambiguity or uncertainty that may arise from the answers. McEwen vs. New York Life Ins. Co., 42 C.A. 133; Mayfield vs. Fidelity & Casualty Co., 16 C.A. (2d) 611.

Defendant's evidence concerning the insured's use of alcohol failed to establish any material misrepresentation, and viewing the entire evidence on this point the Court cannot conclude that the insured's use of alcohol was proven to be excessive or unusual so that it can be said that he misrepresented the facts in answering the general questions propounded to him in the application.

The insured's wife and two daughters, close friends and business associates, including three members of the bar of this Court, who saw him regularly over a period of years, the partner in his Oregon ranch enterprise, and two of his hunting companions all testified that they had never known the insured to be intoxicated or under the influence of alcohol without full possession of all his mental and physical faculties. Defendant's evidence on this point failed to establish by a preponderance of evidence that a misrepresentation had been made.

The other contention made by the defendant is that the insured died by his own hand rather than

as the result of an accident. The rule applicable to the defense of "misrepresentation" is also applicable to the defense of "suicide", i.e., the defendant has the burden of establishing its affirmative defense, *Beers vs. Cal. State Life Ins.*, 87 C.A. 440. The defendant claims that the undisputed physical facts indicating suicide are decisive on the question of burden of proof, and that the physical facts are consistent only with the defense of suicide and are not consistent with the theory of accident. The evidence presented at the trial was without dispute, so far as the actual evidence of the manner in which Mr Houston met his death.

Briefly summarized the evidence was as follows:

On the Friday before Mr. Houston met his death, he put in a full day at his insurance office. He made plans for activities for the coming week which were shown on his calendar by his secretary. He told his secretary he wouldn't stay to dictate a letter to the home office regarding business activities for the coming year of 1954, and would leave it until Tuesday.

On the Saturday preceding his death he attended a function given for his daughter by her sorority. On the following day, Sunday, he went to church, as usual, with his family and spent the afternoon with two business associates making plans for furthering a farming and cattle venture in southern Oregon. That evening Mr. Houston hurried back from the meeting to a dinner with the Hanscoms. Ann Houston, Mr. Houston's younger daughter was engaged to Mr. and Mrs. Hanscom's

son, and they were having a regular family get-together.

Later in the evening the Houston family left for home, and retired about 11:30 p.m. Mrs. Houston testified that her husband slept until late in the afternoon, remaining in bed until 1:30 or 2:00 o'clock, until she called. She said that this was usual and customary, and that on holidays and weekends the family often slept late.

She testified that she and Ann, her daughter, got up about 9:00 or 9:30, that they had their breakfast, and they had done things around the house. On towards lunch time Mrs. Houston awakened her husband and asked him if he wished to come down for breakfast. He said he did.

She asked if he would like to have some tomato juice brought up to him. He said he would, and Mrs. Houston went downstairs, got the juice and put it on the stairway up by the bathroom because by that time Mr. Houston had gone into the bathroom to wash up.

He came out of the bathroom, drank the tomato juice and then came down the stairs in his bathrobe, and pajamas but without his glasses.

As he came down the stairs his daughter Ann was there putting up a bookshelf, and she was singing, "Oh, What a Beautiful Morning," and Mr. Houston's comment was, "It surely is."

Then Ann said to her father, "We're going to have steak for breakfast." He said, "That is fine," or "Sounds good," or words to that effect, and he walked on through the kitchen in which his wife

was working, and down the stairway leading to the basement. In a few minutes both mother and daughter heard a thud or a shot. Mrs. Houston ran down to the basement and she found Mr. Houston there, shot, and she called to Ann to call the ambulance.

The physical facts show that the shooting happened in the middle of a narrow passageway with a low ceiling. Being a tall man Mr. Houston had to stoop while proceeding through the passageway. The body was found some fifteen to twenty-two feet from the place where the shot was fired, as after he was shot, Mr. Houston struggled this distance.

All of the witnesses familiar with Mr. Houston's habits testified that he kept guns all over his home, that he kept guns loaded from time to time, and that he kept shells all over his home. Mr. Houston was an outdoor type man, a sportsman who was accustomed to handling firearms, and who according to the testimony was careful with firearms. According to members of his family he frequently visited the basement dressed in bathrobe and slippers and it was not unusual for him to do so while awaiting completion of preparation of a meal.

It is defendant's claim that Mr. Houston rested the butt of the rifle on the floor of the basement, bent himself over the rifle parallel to the floor, and placed the muzzle of the gun up to his chest pointing at his heart. The bullet came out lower in Mr. Houston's back than when it entered his chest, which the defense claims shows that the death was

suicide. The defense further claims that Mr. Houston could not possibly have tripped and fallen in view of the physical evidence. The plaintiff on the other hand has suggested several ways in which the shooting may have taken place, all as a result of accident.

The Court has studied all of the cases cited by counsel on both sides, some of which cases will be referred to later in this opinion, and has also reviewed the circumstances of this case including the events leading up to the tragedy and the physical facts themselves, and cannot conclude that the defendant has sustained the burden of proving that Mr. Houston's death was the result of suicide.

Regardless of the question of the burden of proof, if the court was of the view that the evidence presented spelled out but one conclusion, namely suicide, it would not hesitate entering judgment for defendant herein. As stated in *Richardson vs. New York Life Inc.*, 174 F.2d 475 (1949), "A suicide case should be tried as any other case, and metaphysical reasoning about presumptions and burden of proof should not be permitted to obscure the real issue, as has been done in so many cases." However, where the evidence has left the court with the definite view that the shooting may have been the result of accident, as the evidence has in this case, the burden of proof does have significant importance.

A review of some of the cases cited by counsel may be helpful. In practically all of the cases cited the question on appeal was whether the trial court

should have directed a verdict for defendant insurance company.

In *U. S. Fidelity and Casualty Co. vs. Blum*, 270 F. 946, the burden was on plaintiff to prove that death was effected through external, violent and accidental means. Insured had fallen from a window. The evidence showed that he had been greatly disturbed by news of fire occurring in property of his in Alaska which he had learned of 10 days before; insured complained of loss of sleep. Court held that question of suicidal intent was for jury and therefore upheld finding of jury for plaintiff.

In the case of *Long vs. California Western States Life Ins. Co.*, 43 Cal. (2d) 871, there was evidence of a declaration of suicidal intent by assured following an argument with his wife immediately prior to shooting. Question of fact for jury who weighed declarations and physical facts and determined suicide.

In *New York Life Ins. Co. vs. Alman*, 22 F. (2d) 98, the insured, the day before his death, made improper advances to a wife of a friend of his. When husband of woman talked with him about event, insured replied that he, insured, ought to be killed or ought to kill himself. Husband advised him that he was going to expose him, and left. Insured was found dead of a gunshot wound in his chest the next morning. The court noted the presence of motive, and refuted plaintiff's contention that the insured could not have deliberately fired the fatal shot. The court then discussed the factors which illustrate that insured could have deliberately fired the shot, therefore, overcoming this defense. In this case it can be

seen that the court weighed the evidence and felt that the plaintiff (who had the burden of proof) did not sustain it, and that although the possibility of accident was not precluded, it was remote. Therefore, judgment had to be rendered in favor of the party not having the burden of proof.

In *Aetna Life Ins. Co. vs. Tooley*, 16 F. (2d) 243, the insured was fatally wounded in the right temple. The court noted that for a year or more preceding his death insured had been in bad health, and had become obsessed with idea that his friends and associates had ceased to value his friendship. The court held that the presumption against suicide was overcome by a preponderance of the evidence, and reversed judgment for the plaintiff.

In *Burkett vs. New York Life Ins. Co.*, 56 F.2d 105, the burden was on the plaintiff to prove that death of insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means.

Insured was fatally wounded through roof of mouth into brain. He had visited family doctor on day of death, and physician testified that in his opinion the insured was neurotic. The court stated, "The insured's conduct in going for the gun during Sunday afternoon, in taking it and loaded shell without asking permission to do so, and then instead of returning to his home, going to a secluded spot in an urban business and residence locality, was consistent with the existence of suicidal intention * * *."

The particular issue in the present case is whether the wound in Mr. Houston's chest was intentionally or accidentally inflicted. The determination of this issue requires a consideration of all surrounding facts and circumstances. The cases cited by defendant all have one or more vital differences from the facts and circumstances here presented, such as location of the wound, kind of firearms used, and particularly statements indicating suicidal intent.

Defendant's counsel relies heavily on the position of insured's body and gun to establish suicide. Admitting for the sake of argument that these factors are consistent with suicide there is nothing else to support a suicide theory. It is uncontroverted that the gun could have been fired accidentally in one of several ways. The position of gun and body appears equally consistent with the theory of accident to this court.

Defendant refers to statements made by Mrs. Houston right after the shooting contained in the official Police Report made out by Officer Pine. Defendant's reference is to the underlined portions.

"Mrs. Houston said at first that he has periods of depression and was depressed lately. Later, however, she said that over this weekend he had been in fine spirits. She said he was not planning any hunting trip nor planning to do any shooting of any kind. Mrs. Houston pointed out a storeroom downstairs where he had two guns stored. She said also that he kept another gun in the corner of the basement section where he was found dead. Mrs. Hous-

ton said that he had been a hunter and outdoorsman all his life and was not careless with guns."

There is nothing startling or out of the ordinary contained in the wife's statements in that all of these matters were fully developed on the trial of this case. It was testified to that Mr. Houston was customarily a little depressed at this time of the year as he had an annual report to prepare in his business. The wife's statement to Officer Pine, itself, states that her husband was in fine spirits over the weekend.

The fact that Mr. Houston wasn't planning any hunting trip nor any shooting of any kind, does not seem overly significant to the court. There are many and varied reasons why Mr. Houston may have gone down into the cellar and taken this gun without having his own destruction in mind.

All of the witnesses that were familiar with Mr. Houston's habits testified that he was careful with firearms, but that he had said that people were careful with loaded guns and therefore the best way to keep people away from them is to load them and tell people so.

The time and place of the shooting does not in the court's view compel a conclusion of suicide. The facts show that Mr. Houston did on occasion go down into the basement to look at his guns. Defendant notes that the only shell in the gun was the one that was fired, from which it is alleged that the single shell had been inserted in the gun immediately prior to the shooting. However, this assumption is unwarranted in view of uncontroverted

testimony of several witnesses that insured habitually kept loaded guns around the house.

Another factor to be considered is the fact that after the shot was fired, the insured, mortally wounded, crawled 15 or more feet from the narrow passageway in which the shooting took place toward the exit from the basement. In none of the cases cited by counsel did a person bent on self-destruction make any effort to change position after mortally wounding himself.

Other than the physical facts which do not preclude the possibility of accidental death, most of the surrounding facts and circumstances tend to support plaintiff's theory of accident. Motive is not a conclusive element where the physical facts clearly point to suicide, nevertheless many of the cases cited discuss the motive element, if for no other reason than to strengthen conclusions already drawn from the physical facts. In the instant case there is nothing, either in insured's actions or statements which would indicate suicidal intent or disposition. The insured was in good health, was successful in business and had no unusual financial worries or domestic difficulties. He had made definite plans and commitments for both the immediate and more distant future, and all witnesses agreed that insured was one who loved life and had every reason to live.

In the case of *Beers vs. California State Life Ins. Co.*, 87 C.A. 440, appears the following statement: "As is true in its application to the proof of the commission of crime, particularly in the

proof of the crime of murder, the rule is that, while the proof of motive is not indispensable, yet the presence or absence of motive is a circumstance going to the question of the quality of the act under inquiry."

How does this statement apply to the present case? The physical facts do not spell out a clear case of suicide. There is room for speculation as to how the shooting actually took place. Certainly if motive factors were present they would influence the trier of fact as to the quality of the act under inquiry. The court cannot, in view of the physical evidence in this case, and the lack of proof of suicidal motive on the part of insured, come to the conclusion that defendant insurance company has shown by a preponderance of the evidence that insured committed suicide.

The defendant has moved to strike the testimony of Dr. Kirk and Mr. Bradford regarding certain tests made with the gun and bullets involved in the actual accident. The court must first state that it would reach exactly the same decision in this case whether this evidence was presented or not. The tests made were firing experiments and firing tests with the gun in question, with bullets exactly the same as the one that killed Mr. Houston, except that the lead slug had been removed from the gun for safety purposes, which removal in no way affected the tests on the mechanical operation of the gun. This evidence was uncontroverted. The testimony of Dr. Kirk and Mr. Bradford was that this particular firearm due to its mechanical make-up

could be fired by ways other than pulling the trigger, e.g., a blow on the butt or a blow on the hammer.

Defendant relies on *Long vs. Cal. Western States Life Ins. Co.*, supra, and *New York Life Ins. Co. vs. Alman*, supra, to support its contention that this evidence is inadmissible. It is the court's view that neither case precludes the admission of this evidence.

In the *Long* case a ballistic expert was produced to testify as to the results of tests he made tripping and falling with a gun to determine how he could produce wounds such as were inflicted on deceased. The court properly held that a qualified physician was the proper expert to testify relative to wounds which might result from a particular set of physical facts. A ballistic expert was not called in this case to testify as to the mechanical operation of the gun. Further, on the first trial of this case, a physicist, called as a witness for defendant, testified that he made numerous tests to determine whether the gun would discharge accidentally from any type of impact or shock, and that in those tests he was unable to cause the gun to discharge. No objection was made to this testimony nor did the court indicate that it was improper. *Long vs. Cal. Western States Life Ins. Co.*, 111 C.A. 2d 254.

In the *Alman* case results of experiments made with small shot fired from the barrel of the gun while it was held against and away from a cardboard box, were received in evidence for the purpose of showing the spread of shot and the pres-

ence or absence of powder marks, which were compared to those on deceased's body. The court held that for experiments to be admissible they must be made under conditions practically identical with the conditions they purport to illustrate, and that these experiments with the cardboard box should not be admitted in evidence in the event of a retrial.

The court is of the view that the tests made were admissible for the limited purpose of demonstrating that this gun could have been discharged other than by pulling the trigger.

In accord with the foregoing it is hereby Ordered that judgment be entered herein upon findings of fact and conclusions of law in favor of plaintiff and against the defendant, and that the respective parties pay their own costs.

Dated: January 10, 1956.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

[Endorsed]: Filed January 10, 1956.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED MODIFICATIONS
TO PLAINTIFF'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT

Pursuant to Rule 21 of the General Rules of Practice, District Court of the United States,

Northern District of California, and without prejudice to or intention to waive its right to contend that findings and judgment should be for Defendant The Canada Life Assurance Company, Defendant proposes the following amendments to the proposed Findings of Fact and Conclusions of Law and Judgment heretofore submitted by plaintiff:

Findings of Fact

1. Page 3, Paragraph IV, add:

"Plaintiff, however, failed to elect to commute said monthly payments and receive such commuted value."

Reason: There is no evidence of any notice to defendant to elect to commute the monthly payments provided for in said policy.

2. Page 3, Paragraph VIII, substitute the following:

"That it is true, as alleged in defendant's first affirmative defense, that the written application for life insurance of William Mark Houston to said defendant, dated September 24, 1953, contained representations made by the said William Mark Houston which were false with respect to said William Mark Houston's use of alcoholic stimulants; that it is not true that all of said statements in said application were untrue and/or were known to said William Mark Houston at the time the same were made to be untrue and false; that it is not true that the provisions of said contract and said policy of life insurance never took effect, but on the contrary the Court finds that while the said

William M. Houston on occasions used alcoholic stimulants to excess, the answers of said insured to the specific question propounded to him in said application were not in his opinion misrepresentations and therefore did not and do not constitute a material misrepresentation with respect to said insured's use of alcoholic stimulants; and the Court further finds that all of said statements in said application were not known by said William M. Houston to be untrue and false, and that the said contract and policy of life insurance upon the life of William M. Houston was a valid, binding, and existing contract in full force and effect on February 22, 1954, the date of the death of said insured."

Reason: To accord with the Court's memorandum opinion holding that the said insured in his opinion did not consider his drinking habits to be excessive or more than occasional.

Conclusions of Law

1. Page 5, Paragraph II, substitute the following:

"That under the terms of said policy of life insurance, plaintiff is entitled to have and recover from said defendant the monthly installments payable thereunder, namely, \$200.00 per month from February 22, 1954, to date of entry of judgment, with interest upon those installments accruing between January 4, 1955 and to date of entry of judgment, at the rate of 7% per annum."

Reasons:

(a) There is no evidence of an election by plaintiff to take the commuted value of the insurance policy. By the terms of California Civil Code Sec. 1449, the right of selection of payment under the said insurance policy is defendant's. Said Sec. 1449 provides as follows:

"If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party."

(b) Interest, in any event, can only be allowed from date of commencement of this action, January 4, 1955. The policy sued upon provides that "The amount due on the assured's death shall be payable on receipt by the Company at its head office of due proof of such death * * *" And where a claim is not due until the proof of death is furnished, interest is allowable only from the date of commencement of the action, where the complaint merely states that proof of death has been made, without showing when, and where the findings only show that the proof was made before commencement of the action. *Himmelein vs. Supreme Council American Legion of Honor*, 33 P. 1130, 4 C.U. 173.

2. Page 5, Paragraph IV, strike on line 21-22 the words "or any misrepresentation."

3. Page 5, Paragraph VI, substitute the following:

“That plaintiff is entitled to judgment against said defendant in the principal sums of \$1693.32 and of the total of monthly installments accrued, at the rate of \$200.00 per month, from January 4, 1955 to date of entry of judgment, payable on the 22nd day of each month, being....., together with interest on the latter figure at the rate of 7% per annum from January 4, 1955.

Judgment

The amount of the judgment should be amended to accord with the above proposed amendment to plaintiff's Paragraph VI of her proposed Conclusion of Law.

Dated: January 25, 1956.

FRANCIS V. KEESLING, JR.,

HENRY C. CLAUSEN,

HENRY C. CLAUSEN, JR.,

/s/ By HENRY C. CLAUSEN, JR.,

Attorneys for Defendant

Certificate of Service by Mail attached.

JUDGMENT

The above-entitled action having come on regularly for trial before the Court above-named; and the second and third causes of action of plaintiff's complaint having been dismissed as to defendants New York Life Insurance Company and Jefferson Standard Life Insurance Company; and plaintiff

Charlotte S. Houston and defendant The Canada Life Assurance Company having appeared personally and through their respective attorneys; and evidence, both oral and documentary, having been introduced; and the matter having been submitted for decision; and findings of fact and conclusions of law having been duly made and filed herein;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff above-named be and she is hereby granted judgment against defendant The Canada Life Assurance Company in the principal sum of \$28,552.00, together with interest thereon in the amount of \$.; and that plaintiff and said defendant shall each bear their respective costs of suit herein incurred.

Done in Open Court this.day of January, 1956.

.

Chief Judge, U. S. District Court

Acknowledgment of Service attached.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having come on regularly for trial before the Court above named and the second and third causes of action of plaintiff's complaint having been dismissed as to defendants New York Life Insurance Company and Jefferson Standard Life Insurance Company, and plaintiff Charlotte S. Houston and defendant The Canada

Life Assurance Company having appeared personally and through their respective attorneys, and evidence, both oral and documentary, having been introduced, and the matter having been submitted for decision, and the Court being fully advised in the premises, now makes the following findings of fact and conclusions of law.

Findings of Fact

I.

Plaintiff at all times herein mentioned has been and now is a resident of the County of Alameda, State of California, and is the widow of William M. Houston, also known as William Mark Houston.

II.

Prior to February 22, 1954 said William M. Houston was a resident of the City of Berkeley, County of Alameda, State of California. On February 22, 1954 said William M. Houston died at his residence in said city and county as a result, directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental cause, to-wit, the accidental discharge of a rifle being carried by said decedent.

III.

On February 22, 1954, said decedent was the named insured of a certain policy of life insurance issued by defendant, The Canada Life Assurance Company, No. 1,003,546, issued as of November 3, 1953 in the face amount of \$10,000.00, subject to

family income provision therein contained. At the date of issue of said policy, to-wit, November 3, 1953 said William M. Houston, named insured therein, was a resident of the City of Berkeley, County of Alameda, State of California. All premiums payable by the insured under the terms of said policy to February 22, 1954 have been paid. Plaintiff is the named beneficiary of said life insurance policy and there are no loans or other indebtedness payable to said defendant pursuant to or secured by said policy. Plaintiff has submitted to said defendant, The Canada Life Assurance Company, due proof of decedent's death from accidental cause in compliance with all requirements of said policy.

IV.

Under said family income provision attached to and made a part of said policy No. 1,003,546, issued by said defendant The Canada Life Assurance Company, plaintiff is entitled to receive a guaranteed income of \$200.00 per month, commencing February 22, 1954 and thereafter a like sum on the same day of each month to and including September 24, 1963, together with the sum of \$10,000.00 on September 24, 1963. Said plaintiff further has the right under said policy to elect to commute said monthly payments and receive a commuted value determined as set forth in said policy. The commuted value of said policy is the sum of \$28,552.00.

V.

Defendant, The Canada Life Assurance Com-

pany, has refused to pay plaintiff the amounts payable to plaintiff under and pursuant to the terms of said policy except only the amount of premiums heretofore paid by said decedent thereunder and said defendant disclaims any other or further liability thereunder.

VI.

As to the denials and special defenses set forth in defendant's answer herein, the Court further finds that, except as otherwise expressly herein found, all of the allegations of the first cause of action of plaintiff's complaint are true, and that all the denials and affirmative defenses of said defendant set forth in the answer of said defendant are untrue.

VII.

That it is not true, as alleged in the said defendant's answer to the first alleged cause of action, that the death of William M. Houston resulted from suicide; that on the contrary the Court finds that the death of said William M. Houston was accidental.

VIII.

That it is not true, as alleged in said defendant's first affirmative defense, that the written application for life insurance of William Mark Houston to said defendant, dated September 24, 1953, contained representations made by the said William Mark Houston which were false and fraudulent with respect to said William Mark Houston's use of alcoholic stimulants; that it is not true that

all of said statements in said application were untrue and/or were known to said William Mark Houston at the time the same were made to be untrue and false, and that it is not true that the provisions of said contract and said policy of life insurance never took effect, but on the contrary the Court finds that the use by said William M. Houston of alcohol was neither excessive nor unusual and that the answers of said insured to the general questions propounded to him in said application did not and do not constitute a material misrepresentation or any misrepresentation with respect to said insured's use of alcoholic stimulants, and in fact each of said answers was true and accurate; and the Court further finds that all of said statements in said application were true and were not known by said William M. Houston to be untrue and false, and that the said contract and policy of life insurance upon the life of William M. Houston was a valid, binding and existing contract in full force and effect on February 22, 1954, the date of the death of said insured.

IX.

That it is true, as alleged in defendant's second affirmative defense to said first cause of action, that the said policy of life insurance contained a provision excluding coverage for death occurring within the first two years from the date of issue of said policy by reason of suicide, but on the contrary that said William M. Houston died as a result of a gun shot wound accidentally inflicted.

Conclusions of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

That said policy of life insurance issued by defendant, The Canada Life Assurance Company, No. 1,003,546, issued as of November 3, 1953, was a valid, existing, binding contract on February 22, 1954 and that plaintiff, as beneficiary thereunder, is entitled to have and recover from said defendant, the amounts payable thereunder by reason of the accidental death of said insured, William M. Houston, on February 22, 1954.

II.

That under the terms of said policy of life insurance, plaintiff is entitled to have and recover from said defendant the commuted value of said life insurance policy as therein provided, to-wit, the sum of \$28,552.00, with interest thereon at the rate of 7% per annum from February 22, 1954 to date of judgment herein; that said sum is wholly due, owing and unpaid.

III.

That said defendant has failed to establish, and the evidence herein does not sustain, any of the denials set forth in said defendant's answer herein.

IV.

That said defendant has failed to establish, and the evidence herein does not sustain, the first af-

firmative defense set forth in defendant's answer herein; but on the contrary the Court finds that there was no material misrepresentation or any misrepresentation contained in the written application of said William M. Houston or otherwise for such policy of insurance.

V.

That defendant has failed to establish, and the evidence herein does not sustain, the second affirmative defense set forth in defendant's answer herein, but on the contrary the Court finds that the death of said insured was the result of accident and was not the result of suicide.

VI.

That plaintiff is entitled to judgment against said defendant in the principal sum of \$28,552.00, together with interest thereon from February 22, 1954 to date of judgment herein at the rate of 7% per annum.

VII.

That the plaintiff and defendant shall each bear their respective costs of suit herein incurred.

Let judgment be entered accordingly.

Dated:, 1956.

.....,
Chief Judge, U. S. District Court

Acknowledgment of Service attached.

[Endorsed]: Filed January 26, 1956.

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED MODIFICATIONS TO PLAINTIFF'S PROPOSED SUPPLEMENTAL AND ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 21 of the General Rules of Practice, District Court of the United States, Northern District of California, and without prejudice to or intention to waive its right to contend that findings and judgment should be for Defendant, Defendant proposes the following amendments to Plaintiff's Proposed Supplemental and Additional Findings of Fact and Conclusions of Law.

1. Page 1, Paragraph IV, delete, and substitute the following:

"Defendant The Canada Life Assurance Company on the 4th day of May, 1954, received from Plaintiff proofs of decedent's death."

Reason: Plaintiff's proposed amendment does not correctly set forth any stipulation made by defendant during the course of the trial. However, the fact is that proofs of death were received by defendant on May 4, 1954. It is this fact, rather than the alleged stipulation, on which a finding should be made.

2. Page 2, Paragraph II, delete, and substitute the following:

"On January 4, 1954, was the sum of \$28,552.00. Under the terms of said policy of life insurance No. 1,003,546 said plaintiff Charlotte S. Houston,

as the beneficiary named in said policy, at the election of said plaintiff, was entitled to receive the commuted value of said policy in lieu of the family income provisions hereinabove set forth. Said Plaintiff gave Defendant no notice of her election to take and receive said commuted value other than by filing and serving her complaint herein, in which by the prayer thereof she asked damages in the sum of \$27,390.00 plus interest thereon at the rate of 7% per annum from February 22, 1954, to date of judgment. The Court specifically finds that Defendant in Paragraph IV of its Answer to said complaint denied that Plaintiff has any rights to said commuted value. Both by said allegation and by its Proposed Modifications to Plaintiff's Proposed Findings of Fact and Conclusions of Law and Judgment said defendant raised objection to plaintiff's request for the commuted value in lieu of monthly payments as provided in said policy."

Reasons:

(a) Plaintiff's proposed supplemental and additional finding seeks as damages interest upon a sum not prayed for and not payable until the receipt by Defendant of a Notice of Selection, which Defendant has as yet not received. Civil Code §1449 specifically requires the giving of notice of selection by the party having the right of selection between alternative acts, otherwise the right of selection vests in the other party. There is no evidence of the receipt by Defendant of such a notice of selection, unless the complaint served herein on January 4, 1954, may be so considered.

(b) The remainder of Plaintiff's proposed supplemental and additional finding is untrue as demonstrated by the above proposed modification.

3. Page 3, Paragraph III, delete line 6 thereof, and substitute the following:

"January 4, 1954."

Reason: Assuming that the complaint suffices as notice of selection, as Plaintiff contends in Paragraph II of her Proposed Supplemental and Additional Findings of Fact and Conclusions of Law, then in any event interest should be allowed upon the principal sum only from January 4, 1954, the date of service of the complaint.

Interest as damages is allowable only where damages certain are vested upon a particular day, in which case interest may be recovered from that particular day. Civil Code §3287. The only day on which the obligation of Defendant became fixed, under plaintiff's admission in Paragraph II of her Proposed Supplemental and Additional Findings of Fact, is the date of service of the summons and complaint.

4. Page 3, Paragraph IV, should be modified as set forth in Defendant's Paragraph III above.

Dated: February 7, 1956.

FRANCIS V. KEESLING, JR.,
HENRY C. CLAUSEN, and
HENRY C. CLAUSEN, JR.,

/s/ By HENRY C. CLAUSEN, JR.,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed February 7, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED SUPPLEMENTAL
AND ADDITIONAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Comes now plaintiff above named, Charlotte S. Houston, and respectfully requests the following supplemental and additional findings of fact and conclusions of law in addition to those proposed in said plaintiff's proposed Findings of Fact and Conclusions of Law heretofore filed in the above entitled action:

I.

Plaintiff respectfully requests that paragraph III, page 2 of said proposed Findings of Fact be amended and changed by inserting after the word "Plaintiff" on line 21, the following: ", on May 4, 1954,"; and further inserting on line 24 of said paragraph III, page 2, after the words "of said policy" the following:

"and defendant Canada Life Assurance Company at the trial of this action stipulated that said proof of loss and claim was dated April 16, 1954 and was filed with and received by said defendant Canada Life Assurance Company on said 4th day of May, 1954 and that said proof of loss and claim was in proper form, as required by said defendant in said policy No. 1,003,546 and amendments thereto, and that said defendant raised no question as to the proof of loss from a technical standpoint and the only defenses urged in said action and at the time

of trial were the affirmative defenses of said defendant, namely, the defense that the insured had committed suicide and had made misrepresentations as to the extent of his drinking in his application for insurance.”

II.

Plaintiff respectfully requests that paragraph IV, page 3 of said proposed Findings of Fact be amended and changed by inserting after the words “said policy” on line 4, the following:

“at the date of death was and is the sum of \$28,552.00 and under the terms of said policy of life insurance No. 1,003,546 said plaintiff Charlotte S. Houston, as the beneficiary named in said policy, at the election of said plaintiff, was entitled to receive the commuted value of said policy in lieu of the family income provisions hereinabove set forth; that said plaintiff Charlotte S. Houston elected to take and receive said commuted value of said life insurance policy in accordance with the terms of said policy and amendments thereto in her complaint herein and the prayer thereof. The Court further finds that defendant Canada Life Assurance Company made no objection during the trial or at any other time to plaintiff’s request and prayer in said complaint that plaintiff recover said commuted value in the sum of \$28,552.00 in lieu of monthly payments as provided in said policy.”

III.

Plaintiff respectfully requests that paragraph II on page 5 of the Conclusions of Law be amended

by striking "February 22, 1954" on line 11, and inserting in lieu thereof "May 4, 1954."

IV.

Plaintiff respectfully requests that paragraph VI on page 6 of the Conclusions of Law be amended by striking "February 22, 1954" on line 2, and inserting in lieu thereof "May 4, 1954".

Respectfully submitted this 2nd day of February, 1956.

/s/ PHILIP H. ANGELL,
/s/ ROBERT M. ADAMS, JR.,
/s/ PHILIP H. ANGELL, JR.,
/s/ ANGELL and ADAMS,
/s/ By PHILIP H. ANGELL,
Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed February 8, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action having come on regularly for trial before the Court above named and the second and third causes of action of plaintiff's complaint having been dismissed as to defendants New York Life Insurance Company and Jefferson Standard Life Insurance Company, and plaintiff

Charlotte S. Houston and defendant The Canada Life Assurance Company having appeared personally and through their respective attorneys, and evidence, both oral and documentary, having been introduced, and the matter having been submitted for decision, and the Court being fully advised in the premises, now makes the following findings of fact and conclusions of law:

Findings of Fact

I.

Plaintiff at all times herein mentioned has been and now is a resident of the County of Alameda, State of California, and is the widow of William M. Houston, also known as William Mark Houston.

II.

Prior to February 22, 1954 said William M. Houston was a resident of the City of Berkeley, County of Alameda, State of California. On February 22, 1954 said William M. Houston died at his residence in said city and county as a result, directly and independently of all other causes, of bodily injury effected solely through external, violent and accidental cause, to-wit, the accidental discharge of a rifle being carried by said decedent.

III.

On February 22, 1954, said decedent was the named insured of a certain policy of life insurance issued by defendant, The Canada Life Assurance Company, No. 1,003,546, issued as of November 3,

1953 in the face amount of \$10,000.00, subject to family income provision therein contained. At the date of issue of said policy, to-wit, November 3, 1953 said William M. Houston, named insured therein, was a resident of the City of Berkeley, County of Alameda, State of California. All premiums payable by the insured under the terms of said policy to February 22, 1954 have been paid. Plaintiff is the named beneficiary of said life insurance policy and there are no loans or other indebtedness payable to said defendant pursuant to or secured by said policy. Plaintiff on May 4, 1954 has submitted to said defendant, The Canada Life Assurance Company, due proof of decedent's death from accidental cause in compliance with all requirements of said policy, and defendant Canada Life Assurance Company at the trial of this action stipulated that said proof of loss and claim was dated April 16, 1954 and was filed with and received by said defendant Canada Life Assurance Company on said 4th day of May, 1954 and that said proof of loss and claim was in proper form, as required by said defendant in said Policy No. 1,003,546 and amendments thereto, and that said defendant raised no question as to the proof of loss from a technical standpoint and the only defenses urged in said action and at the time of trial were the affirmative defenses of said defendant, namely, the defense that the insured had committed suicide and had made misrepresentations as to the extent of his drinking in his application for insurance.

IV.

Under said family income provision attached to and made a part of said policy No. 1,003,546, issued by said defendant The Canada Life Assurance Company, plaintiff is entitled to receive a guaranteed income of \$200.00 per month, commencing February 22, 1954 and thereafter a like sum on the same day of each month to and including September 24, 1963, together with the sum of \$10,000.00 on September 24, 1963. Said plaintiff further has the right under said policy to elect to commute said monthly payments and receive a commuted value determined as set forth in said policy. The commuted value of said policy at the date of death was and is the sum of \$28,552.00 and under the terms of said policy of life insurance No. 1,003,546 said plaintiff Charlotte S. Houston, as the beneficiary named in said policy, at the election of said plaintiff, was entitled to receive the commuted value of said policy in lieu of the family income provisions hereinabove set forth; that said plaintiff Charlotte S. Houston elected to take and receive said commuted value of said life insurance policy in accordance with the terms of said policy and amendments thereto in her complaint herein and the prayer thereof. The Court further finds that defendant Canada Life Assurance Company made no objection during the trial or at any other time to plaintiff's request and prayer in said complaint that plaintiff recover said commuted value in the sum of \$28,552.00 in lieu of monthly payments as provided in said policy.

V.

Defendant, The Canada Life Assurance Company, has refused to pay plaintiff the amounts payable to plaintiff under and pursuant to the terms of said policy except only the amount of premiums heretofore paid by said decedent thereunder and said defendant disclaims any other or further liability thereunder.

VI.

As to the denials and special defenses set forth in defendant's answer herein, the Court further finds that, except as otherwise expressly herein found, all of the allegations of the first cause of action of plaintiff's complaint are true, and that all the denials and affirmative defenses of said defendant set forth in the answer of said defendant are untrue.

VII.

That it is not true, as alleged in the said defendant's answer to the first alleged cause of action, that the death of William M. Houston resulted from suicide; that on the contrary the Court finds that the death of said William M. Houston was accidental.

VIII.

That it is not true, as alleged in said defendant's first affirmative defense, that the written application for life insurance of William Mark Houston to said defendant, dated September 24, 1953, contained representations made by the said William Mark Houston which were false and fraudulent with respect to said William Mark Houston's use

of alcoholic stimulants; that it is not true that all of said statements in said application were untrue and/or were known to said William Mark Houston at the time the same were made to be untrue and false, and that it is not true that the provisions of said contract and said policy of life insurance never took effect, but on the contrary the Court finds that the use by said William M. Houston of alcohol was neither excessive nor unusual and that the answers of said insured to the general questions propounded to him in said application did not and do not constitute a material misrepresentation or any misrepresentation with respect to said insured's use of alcoholic stimulants, and in fact each of said answers was true and accurate; and the Court further finds that all of said statements in said application were true and were not known by said William M. Houston to be untrue and false, and that the said contract and policy of life insurance upon the life of William M. Houston was a valid, binding and existing contract in full force and effect on February 22, 1954, the date of the death of said insured.

IX.

That it is true, as alleged in defendant's second affirmative defense to said first cause of action, that the said policy of life insurance contained a provision excluding coverage for death occurring within the first two years from the date of issue of said policy by reason of suicide, that it is not true that said William M. Houston died as a result

of suicide, but on the contrary that said William M. Houston died as a result of a gun shot wound accidentally inflicted.

Conclusions of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I.

That said policy of life insurance issued by defendant, The Canada Life Assurance Company, No. 1,003,546, issued as of November 3, 1953, was a valid, existing, binding contract on February 22, 1954 and that plaintiff, as beneficiary thereunder, is entitled to have and recover from said defendant, the amounts payable thereunder by reason of the accidental death of said insured, William M. Houston, on February 22, 1954.

II.

That under the terms of said policy of life insurance, plaintiff is entitled to have and recover from said defendant the commuted value of said life insurance policy as therein provided, to wit, the sum of \$28,552.00, with interest thereon at the rate of 7% per annum from May 4, 1954 to date of judgment herein; that said sum is wholly due, owing and unpaid.

III.

That said defendant has failed to establish, and the evidence herein does not sustain, any of the denials set forth in said defendant's answer herein.

IV.

That said defendant has failed to establish, and the evidence herein does not sustain, the first affirmative defense set forth in defendant's answer herein; but on the contrary the Court finds that there was no material misrepresentation or any misrepresentation contained in the written application of said William M. Houston or otherwise for such policy of insurance.

V.

That defendant has failed to establish, and the evidence herein does not sustain, the second affirmative defense set forth in defendant's answer herein, but on the contrary the Court finds that the death of said insured was the result of accident and was not the result of suicide.

VI.

That plaintiff is entitled to judgment against said defendant in the principal sum of \$28,552.00, together with interest thereon from May 4, 1954 to date of judgment herein at the rate of 7% per annum.

VII.

That the plaintiff and defendant shall each bear their respective costs of suit herein incurred.

Let judgment be entered accordingly.

Dated: February 8, 1956.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

[Endorsed]: Filed February 8, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 34,395

CHARLOTTE S. HOUSTON, Plaintiff,

vs.

THE CANADA LIFE ASSURANCE COMPANY, et al., Defendants.

JUDGMENT

The above entitled action having come on regularly for trial before the Court above named; and the second and third causes of action of plaintiff's complaint having been dismissed as to defendants New York Life Insurance Company and Jefferson Standard Life Insurance Company; and plaintiff Charlotte S. Houston and defendant The Canada Life Assurance Company having appeared personally and through their respective attorneys; and evidence, both oral and documentary, having been introduced; and the matter having been submitted for decision; and findings of fact and conclusions of law having been duly made and filed herein;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff above named be and she is hereby granted judgment against defendant The Canada Life Assurance Company in the principal sum of \$28,552.00, together with interest thereon from May 4, 1954 to February 8, 1956 at the rate of 7% per annum, or the sum of

\$3,531.84 interest; and that plaintiff and said defendant shall each bear their respective costs of suit herein incurred.

Done in Open Court this 8th day of February, 1956.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

Entered in Civil Docket 2/9/56.

[Endorsed]: Filed February 8, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that The Canada Life Assurance Company, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 8, 1956.

Dated: February 23, 1956.

FRANCIS V. KEESLING, JR.,

HENRY C. CLAUSEN,

HENRY C. CLAUSEN, JR.,

/s/ By HENRY C. CLAUSEN, JR.,

Attorneys for Defendant

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Canada Life Insurance Company, herein, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered February 8, 1956 by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of Canada Life Insurance Company, Appellant, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to which amount said Fidelity and Deposit Company of Maryland acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on ac-

count of such breach, and render judgment therefor against it and award execution therefor.

Signed, Sealed and Dated this 1st day of March, 1956.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
/s/ By ROYDEN C. TOMLINS,
Attorney-in-Fact

Notary Public Certificate attached.

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Whereas, the Defendant, The Canada Life Assurance Company, in the above-entitled action has appealed to the United States Court of Appeals for the Ninth Circuit from a judgment made and entered against said Defendant in said action, in the said District Court, in favor of the plaintiff in said action, on the 8th day of February, 1956 for Twenty-eight Thousand Five Hundred Fifty-two and no/100 (\$28,552.00) Dollars and interest in the amount of Three Thousand Five Hundred Thirty-one and 84/100 (\$3,531.84) Dollars.

Whereas, the Appellant is desirous of staying the execution of the said Judgment so appealed from.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, The Canada Life Assurance Company, as Principal, and Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under the laws of the State of Maryland, and duly authorized to transact a general surety business in the State of California, as Surety, do hereby acknowledge themselves justly bound in the sum of Thirty-Six Thousand and No/100 Dollars (\$36,000.00), jointly and severally, firmly by these presents, to the effect that if the said judgment so appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the Appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all such costs, interest and damages as the Appellate Court may adjudge and award.

And, Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

In Witness Whereof, the seal and signature of said Principal is hereto affixed and the corporate

name of the said Surety is hereto affixed by its duly authorized officer at San Francisco, California, this 1st day of March, 1956.

THE CANADA LIFE ASSURANCE
COMPANY,

/s/ By [Illegible]

Branch Manager, San Francisco,
Calif.

[Seal] FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,

/s/ By ERBON DELVENTHAL,
Attorney-in-Fact

Notary Public Certificate attached.

Approved:

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District Court

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the defendants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Ninth Circuit taken by notice of appeal filed on the 6th day

of February, 1956, the entire record of all proceedings and evidence in this action.

FRANCIS V. KEESLING, JR.,

HENRY C. CLAUSEN,

HENRY C. CLAUSEN, JR.,

/s/ By HENRY C. CLAUSEN,

Attorneys for Defendant The Canada Life Assurance Company

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1956.

[Title of District Court and Cause.]

EXCERPTS FROM DOCKET ENTRIES

1955

Jan. 14—Filed petition on removal with copy of complaint and summons attached (by The Canada Life Assurance Company).

Jan. 14—Filed Bond on removal in sum \$250.00.

Jan. 18—Filed transcript on removal by Jefferson Standard Life Ins. Co. and N. Y. Life Ins. Co. with summons and complaint attached.

Jan. 18—Filed bond on removal by Jefferson Std. and N. Y. Life Ins. Co.

Jan. 18—Filed cost bond by defts. Jefferson Std. and N. Y. Life Ins. Co.

* * * * *

Jan. 27—Filed notice by Jefferson Std. Life Association of Bledsoe, Smith & Cathcart as counsel.

* * * * *

1955

Mar. 10—Filed answer of New York Life Insurance Company.

* * * * *

Mar. 24—Filed answer of Jefferson Standard Life Ins. Co.

* * * * *

Apr. 5—Filed answer of The Canada Life Assurance Company.

Apr. 9—Filed notice and motion by plaintiff to strike from answer of Canada Life Assurance Co. April 18, 1955, with supporting memo.

Apr. 18—Ordered motion to strike from answer off calendar (no appearances) (Judge Hamlin).

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June 20—Ordered for trial Sept. 26, 1955. (Judge Murphy).

* * * * *

July 13—Ordered trial continued to Nov. 7, 1955. (Judge Murphy).

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Oct. 5—Filed order dismissal as to New York Life Insurance Company, with prejudice and without costs (Judge Harris).

Oct. 20—Filed dismissal by plaintiff with prejudice as to Jefferson Standard Life Insurance Company.

* * * * *

Nov. 7—Ordered case assigned to Judge Roche for trial this date (Judge Harris. Court trial Nov. 7, 8, 9, 10, 14 and 15, 1955. (Judge Roche)

* * * * *

1955

Dec. 5—Ordered case submitted (Judge Roche).

1956

Jan. 10—Filed memo. opinion of Court (Judgment for plaintiff. Counsel to prepare findings, conclusions and form of judgment) (Judge Roche).

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Jan. 26—Filed proposed modification of findings and conclusions, by deft.

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Feb. 7—Filed defendant's proposed modifications to supplemental and additional findings and conclusions by plaintiff.

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Feb. 8—Filed proposed supplemental findings and conclusions by plaintiff.

Feb. 8—Filed findings of fact and conclusions of law (Judge Roche).

Feb. 9—Entered judgment—filed Feb. 8, 1956—for Charlotte S. Houston vs. Canada Life Assurance Company in sum \$28,552.00 with \$3,531.84 interest to Feb. 8, 1956. No costs allowed. (Judge Roche)

Feb. 9—Mailed notices.

Mar. 6—Filed notice of appeal by Canada Life Assurance Co.

Mar. 6—Filed cost bond on appeal in sum \$250.00.

Mar. 6—Filed supersedeas bond in sum \$36,000.00, "Approved, Michael J. Roche, Chief U. S. Dist. Judge."

1956

Mar. 6—Filed appellant's designation of record on appeal.

Mar. 7—Mailed notices.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Petition for Removal by The Canada Life Assurance Company from Superior Court of the State of California in and for the County of Alameda, with copy of summons and complaint attached.

Bond on Removal.

Petition for Removal by Jefferson Standard Life Insurance Company, a Corporation and New York Life Insurance Company, a corporation, from Superior Court of the State of California in and for the County of Alameda, with copy of summons and complaint attached.

Bond on Removal.

Bond for Security for Costs.

Notice of Association of Counsel.

Answer of New York Life Insurance Company with copy of Policy of Insurance attached.

Answer of Jefferson Standard Life Insurance Company.

Answer of The Canada Life Assurance Company with copy of Policy of Insurance attached.

Notice and Motion of Plaintiff to Strike from Answer of The Canada Life Assurance Company, with supporting memo and affidavit.

Dismissal of action as to New York Life Insurance Company.

Dismissal of action as to Jefferson Standard Life Insurance Company.

Memorandum Opinion of Court.

Proposed modifications by defendant to findings of fact and conclusions of law proposed by plaintiff.

Proposed modifications by defendant to supplemental and additional findings of fact and conclusions by law proposed by plaintiff.

Proposed supplemental and additional findings of fact and conclusions of law by plaintiff.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Appeal Bond.

Supersedeas Bond on Appeal.

Appellant's Designation of Record on Appeal.

Reporter's Transcript of Proceedings, Nov. 7, 8, 9, 10, 14.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.

Defendant's Exhibits A, B, C, D, E, G, H, I, J, and K and L.

(Defendant's Exhibit F, Police Department Records, withdrawn.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 12th day of April, 1956.

[Seal] C. W. CALBREATH,
 Clerk
/s/ By MARGARET P. BLAIR,
 Deputy Clerk

In the United States District Court for the Northern District of California, Southern Division

No. 34395

CHARLOTTE S. HOUSTON, Plaintiff,

vs.

THE CANADA LIFE ASSURANCE COMPANY,
et al., Defendants.

REPORTER'S TRANSCRIPT

November 7, 1955, 10:00 a.m.

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiff: Angell & Adams, by Philip H. Angell, Esq.; Robert M. Adams, Esq.; Philip H. Angell, Jr., Esq. For the Defendant:

Keesling & Keesling, by Henry C. Clausen, Esq. and Henry C. Clausen, Jr., Esq. [1*]

The Clerk: Houston versus The Canada Life, for trial.

Mr. Clausen: Ready for the defendant.

Mr. Angell: Ready for the plaintiff.

The Court: Proceed.

Mr. Angell: If your Honor please, this is a complaint, which is very simple, the issues will be very simple here, and I think the factual data also. The complaint is an action brought upon a life insurance policy, the insured having died by gunshot wound about eight months after the issuance of the policy. The policy was issued by The Canada Life Assurance Company in—I believe it was in November, the 3rd, of 1953, and the death occurred in February of 1954.

The complaint alleges the death of the assured, it sets forth the terms of the insurance contract with Canada Life, and also joins two other insurance companies, your Honor, the New York Life and the Jefferson Insurance Company, both defendants, the latter defendants having been dismissed, the action as to them, there having been a settlement with the defendants before this trial.

I might say that the issues with respect to the two that were dismissed were somewhat different from those of the Canada Life. The Canada Life policy is defended upon the ground that the death was due to

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

suicide, and there was a suicide clause [4] in the policy that did not assume that risk, and there would be nothing due under the policy if death was due to a suicide. The second affirmative defense pleaded by the defendant is that there was misrepresentation in the application for the insurance in that the assured stated that he only used alcoholic beverages occasionally and socially and not to excess, and the answer in the affirmative defense states that that was untrue and misrepresentation, that the assured did use alcoholic beverages to excess and more than socially, occasionally.

The plaintiff in this case will show your Honor that the circumstances surrounding the death—although I believe that under the cases upon the admitted facts in the pleadings the plaintiff would not be required to go forth at this time, because the making of the insurance contract is admitted, the death is admitted, and while there is a statement that due proof is not made, I think that is a formal denial, I think that it will be admitted that proof was filed, but it was claimed that the proof did not state that the death was due to suicide and it was accidental and hence was not adequate. There was no demand for further proof and hence I assume that that comes under their first or second affirmative denial on the ground that they claim the deceased met his death by suicide. However, I think it would be more orderly and to the interest of all parties for us to proceed to show the [5] circumstances immediately prior to the date of the deceased's death and to go into the facts which preceded the date of death and on the date of death, and we think those facts

will show conclusively to this court that not only was this an accidental death but in addition there was no excessive use of alcohol by this assured and no representations made.

Mr. Clausen: Your Honor, just a word, if I may, to outline the defendant's position. The policy of The Canada Life Assurance Company that is here involved makes available to the defendant the two special defenses which have been alleged. No. 1, that the insured committed suicide, and, No. 2, that in any event, regardless of the suicide episode, the fact was that, as found out later in the investigation following the suicide, it was disclosed that he had made material misrepresentations in any event in his application for the insurance in respect of drinking habits. Your Honor, the policy application was made by the insured at Lakeview, Oregon, in the latter part of 1953 and the death of the insured occurred within a few months thereafter, Washington's Birthday of last year, 1954.

Very briefly, your Honor, in regard to the proof that the insured did commit suicide on this occasion, I am not going to outline the facts to you, but I will state that the physical facts alone, your Honor, demonstrate that it was intentional self-destruction. [6]

With regard to the other defense of material misrepresentations, answers were given to the questions as to drinking and the insured said he only drank occasionally and never used them, intoxicants, to excess. Well, the facts will show, your Honor, that that was a material misrepresentation, and so with that proof on either one of those grounds we ask the

court, at the proper time, for a judgment for the defendant.

With regard to the order of proof, your Honor, we are prepared to proceed at this time.

Mr. Angell: We have no objection to your proceeding. We think that is a more orderly procedure, Mr. Clausen.

There are a couple of amendments, I would like to ask your stipulation, on the face, that since the filing of this complaint the plaintiff, Mrs. Houston, has been married and her name now is Charlotte Houston Clayton.

Mr. Clausen: What is the name?

Mr. Angell: Clayton, C-l-a-y-t-o-n.

Mr. Clausen: Clayton. We have no objection to that amendment, your Honor.

Mr. Angell: And it will be made on the face of the complaint.

For the purpose of the record downstairs, I think we will file with the Clerk and serve on Mr. Clausen just a document showing it, so it will be in your file for [7] convenience.

The other stipulation we would like—I think it is already covered in the pleadings—and that is that the complaint alleges the commuted value of this insurance as \$27,390. The answer states that the commuted value is \$28,552.

By that we mean, your Honor, the averment of the insurance was that upon the death of the assured if the death was not due to suicide or if there was no fraud, the widow was entitled to \$200.00 a month for ten years, and then upon the expiration of those ten

years the payment of a flat sum of \$10,000, and that the commuted value, as alleged in the answer, is \$28,552.

In our complaint we miscalculated that commuted value. The schedule for figuring is in the policy. But, may it be stipulated that the answer is correct and that the commuted value of that policy will be \$28,552?

Mr. Clausen: You are speaking solely as the figure which would be derived from the policy itself?

Mr. Angell: Oh, yes.

Mr. Clausen: Well, whatever the policy shows is correct and I assume therefore that the answer is certainly correct and we have the original policy right here.

Mr. Angell: Paragraph IV of the answer alleges the commuted value is \$28,552 as of February 22, 1954, which is [8] the date of the death.

Mr. Clausen: In other words, what you are saying is that our answer contains the correct figure and you wish to put that in your complaint?

Mr. Angell: That's correct. There would be no issue on that.

Mr. Clausen: I have no objection to that.

The Court: The record so shows.

Mr. Angell: As to the order of proof, Mr. Clausen said he is ready to proceed on the affirmative defenses. We have no objection to his proceeding.

Mr. Clausen: We will call, your Honor, first, Mr. Parker.

EDWIN F. PARKER

called as a witness on behalf of the defendants;
sworn.

The Court: What is your full name?

The Witness: Edwin F. Parker.

The Court: Where do you reside?

The Witness: At 2516 Ashby Avenue, Berkeley, California.

The Court: Your business or occupation?

The Witness: Retired the first of October, Berkeley Police Department. I am in retirement status at the present.

The Court: Berkeley Police Department.

The Witness: Yes, sir.

The Court: What capacity?

The Witness: Inspector. [9]

The Court: Take the witness.

Direct Examination

Q. (By Mr. Clausen): How long, Mr. Parker, were you an officer connected with the Berkeley Police Department?

A. A little over twenty-five years.

Q. Twenty-five years. In this particular matter that we are concerned with, did you make an investigation concerning the death of the party named, Houston, Mr. Houston, in this case?

A. Yes, sir, I did.

Q. Can you tell me in point of time when that was, what date that was?

A. The 22nd of February, 1954, and I arrived at

(Testimony of Edwin F. Parker.)

the residence involved about two-thirty in the afternoon.

Q. You arrived at the scene about two-thirty in the afternoon? A. Yes.

Q. What did you do when you arrived there, Mr. Parker?

A. I talked to Officer Pine of the Berkeley Police Department who was already present and made an inspection of the premises and of the body without moving the body at that time.

Q. Did you in the course of the official investigation make some notes, Mr. Parker?

A. I made notes at the time, which were later—which I typed up myself later or dictated them—I don't recall which. I don't have the original notes that were made at that time. [10]

Q. Do you have a copy, Mr. Parker, from which you—do you have something that you typed up from those notes?

A. No. I have a—just a brief handwritten memorandum of the date and the time and the rifle involved, but not a copy of the report.

Q. What is it that you have there, Mr. Parker?

A. Just a few miscellaneous notes that I made from my original report.

Q. And did you make these notes shortly after the investigation?

A. I dictated the report and signed it immediately after the investigation. The notes that you have there were made, I believe it was Friday of last week.

(Testimony of Edwin F. Parker.)

Q. I see.

A. Made from the original signed report which I dictated.

Q. Where is that original signed report, Mr. Parker?

A. It is in the files of the Berkeley Police Department.

Q. Would you bring that over?

A. I am not permitted to remove reports from the file, counsel, if you please.

Q. Well, the court has jurisdiction over the matter of records in police departments, I believe, and I would ask your Honor's authorization—from the court—to ask the officer to bring that on the recess of the court, say over the noon hour. [11]

Mr. Angell: If your Honor please, we have two objections. No. 1, these reports are not admissible in evidence. No. 2, that they are confidential within the police department. And, No. 3, that Inspector Parker is no longer connected with the police department. And the proper method of approaching is known to Mr. Clausen as well as myself. And directing this officer, who is not now an officer therein, in the police department—even if he were—to produce something without issuing a subpoena duces tecum directed to the keeper of those records, I will have to say that I don't think it should be done. I don't think this witness could. Could you, Inspector Parker?

A. It would be in violation of the department's

(Testimony of Edwin F. Parker.)

records for me to remove any document from the file.

Mr. Angell: You are a retired officer?

A. I am a retired officer.

Mr. Angell: You have no access to those records?

A. I am not on active duty.

Mr. Angell: Other than those given you by request, is that right?

A. Only by request of the court to the keeper of the records.

Mr. Clausen: Your Honor, the other officer involved, Pine, I believe is still with the department. In any event, he is here in the courtroom and I would then ask Officer Pine, when he takes the stand, that the court ask Officer Pine to [12] bring over the investigation reports of himself and Officer Parker.

The Court: You better withdraw this witness and call him to the stand and have him sworn.

Mr. Clausen: Yes, your Honor.

The Court: Step down.

Mr. Clausen: Step down, Mr. Parker.

(Witness excused.)

Mr. Clausen: Officer Pine, would you take the stand, please?

KENNETH C. PINE

called on behalf of the defendants; sworn.

The Court: Your full name, please.

A. My name is Kenneth C. Pine.

The Court: Where do you reside?

(Testimony of Kenneth C. Pine.)

A. 1767 Ardeth Drive in Concord.

The Court: Concord?

A. Concord—Pleasant Hill.

The Court: Your business or occupation?

A. I am a police patrolman for the City of Berkeley.

The Court: How long have you been so engaged?

A. Thirteen and a half years.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Clausen): Officer Pine, do you recall in 1954 [13] being called to make an investigation concerning a death at the home of Mr. Houston?

A. Yes, I do.

Q. Do you recall the date and the time that you arrived at the scene?

A. It was on the 22nd of February, and I arrived there at approximately 2:15.

Q. And in the course of the investigation done by yourself did you meet with Mr. Parker, who was just on the stand?

A. Yes. He came shortly after I did.

Q. You were both then employed by the City of Berkeley Police Department? A. Yes.

Q. And the premises that we are concerned with were located where, Mr. Pine—the address?

A. (Witness referring to his notes.) 1082 Miller Avenue in Berkeley.

Q. In Berkeley? A. Yes.

Q. Did you make a written report?

(Testimony of Kenneth C. Pine.)

A. Yes, I did.

Q. Did that written report go in to your superiors? A. Yes.

Q. And were some pictures also taken of the body that was there found? [14]

A. Yes.

Q. Do you have that written report with you or a copy? A. No, I don't.

Q. And is it available in the department of the Berkeley Police?

A. It is available if properly requisitioned or subpoenaed.

Q. All right. A. I believe.

Mr. Clausen: Your Honor, we will ask the court to ask the officer to bring over, following the noon recess, the investigation report of himself, of Mr. Parker, and the pictures taken.

The Court: You will have to get your subpoena for him.

Mr. Clausen: All right.

The Witness: It will have to be submitted to my superior officer in the form of a subpoena.

The Court: Yes.

Mr. Clausen: Very well.

Q. Now, with regard to the incident itself——

Mr. Angell: I will assist you, so that subpoena be directed to the right officer, I am informed this officer ought to know, that Officer Sherry—he is a lieutenant—is in charge of records at Berkeley Police Department and the subpoena should issue to him.

Am I correct? [15]

(Testimony of Kenneth C. Pine.)

A. He is in charge of records, but I believe the subpoena should be made to the chief, Holstrom.

Q. (By Mr. Clausen): Chief of Police Holstrom? A. Holstrom.

Q. All right. When you arrived at the scene what did you find there, Mr. Pine?

A. There was another officer who arrived shortly ahead of me, Officer Chandler.

Q. Chandler?

A. And he was in—yes, H. C. Chandler.

Q. And Officer Chandler was connected, was he, with what department?

A. Berkeley Police Department.

Q. All right.

A. He was in the basement where Mr. Houston's body was found; where it was found on the floor.

Q. What did you see when you arrived then, Mr. Pine?

A. Well, I saw Mr.—this body, who I later found out to be Mr. Houston, lying on the floor in the basement.

Q. And what is it that you are holding in your hand there?

A. I have some notes that I made at the time.

Q. That you made at the time you were there?

A. Yes.

Q. May I see those, please?

A. Their names and addresses, certain facts (producing and [16] handing counsel).

Q. All right.

(Testimony of Kenneth C. Pine.)

The Court: You made at the scene of this occurrence?

A. Yes, wrote them while there, except for the final page, which was made about a month or so later at an inquest. That particular page was not made at the scene. That was further——

Q. (By Mr. Clausen): You are speaking of this third page? A. Yes.

Mr. Clausen: I have no objection to your refreshing your recollection, if you need, from those notes.

Q. Where in the house was the body, Mr. Pine?

A. There is a basement section to the rear of the house, accessible by way of a stairway from the kitchen, and an outside doorway on the south side of the house.

Q. And here on the blackboard is a diagram supplied by plaintiff's counsel this morning. Would you tell me the approximate position in respect of the diagram where the body was when you found it?

Mr. Angell: If your Honor please——

The Court: I suggest that you familiarize the witness with the diagram.

Mr. Angell: May I suggest, for the record, so we can refer to it by some exhibit number, that we call it—I have no objection to calling it Plaintiff's A for identification.

The Court: No objection? [17]

Mr. Clausen: No objection.

Mr. Angell: Even in evidence, if you wish.

The Court: Let it be so marked.

(Testimony of Kenneth C. Pine.)

(Large diagram on blackboard marked for identification Plaintiff's Exhibit 1.)

Q. (By Mr. Clausen): Now, Mr. Pine, with respect to the premises here. Step to the board. Are you able to recollect, with reference to the diagram——

The Court: There is a pointer down there. You might step aside so I can follow.

Q. (By Mr. Clausen): It indicates here "Stairs" — "Closet" under stairway — "Closet" — "Servant's Room"—. The map is drawn with north in the direction that I am now pointing. "Hanging laundry" on this side. "Table." "Hole cut in floor." "Bedding."

Now, with reference to that diagram, can you tell me this, are you able to locate the general area where you found the body, when you saw the body?

A. Yes, sir.

Q. Where would that be? Would you point to that?

A. To my recollection, it was right in this approximate position, the head pointing this way, alongside of the ironer.

The Court: Alongside what?

A. Alongside the ironer, with the head pointing approximately east. [18]

Q. (By Mr. Clausen): Did you then see a gun there?

A. Yes, I saw a gun in the approximate position—right over in this area.

Mr. Angell: If your Honor please, I would suggest, in the interest of clarity in the record, that

(Testimony of Kenneth C. Pine.)

each time the witness fixes a location of anything that he put his initial down starting with "1" or "A" and then mark what it is, so that when other witnesses get here and put their testimony in we will be able to keep track of our record in the case.

Mr. Clausen: I was going to do that, Mr. Angell, but in fairness to the witness I wanted the witness first to familiarize himself with this diagram.

Q. You haven't seen this diagram before, have you? A. No, I haven't. I have my own.

Q. You have one of your own?

A. A rough diagram (witness producing).

Q. Well, I will ask you to refer, then, if you will, to your own diagram for recollection purposes and to draw in on the diagram on the board, Plaintiff's 1, the figure, as near as you can recall, of the body of Mr. Houston when you saw it on arriving there.

Mr. Angell: May the record show that the witness is using a red crayon for designative ease.

The Court: The record will also show.

Mr. Clausen: I am also going to mark this, if the court [19] please, "P-1."

(Counsel designating P-1 on diagram, Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Clausen): With that same crayon would you draw where you saw the gun?

A. It may be out of proportion, but that is it approximately (indicating).

Mr. Clausen: I will mark this "P-2."

(Counsel marking on Plaintiff's 1 for identification designation "P-2.")

(Testimony of Kenneth C. Pine.)

Mr. Clausen: Resume the stand, please.

Q. When you arrived there, Mr. Pine, who else was down in the basement?

A. Officer Chandler was and the ambulance crew. There were two men, the——

Q. The ambulance crew?

A. The ambulance crew.

Q. When you arrived it was what time?

A. Approximately 2:15 or thereabouts.

Q. Did you make an observation to determine where the gun had been fired?

A. To some extent. Where the gun lay there was a mark of blood on the floor.

Q. In other words, at the point where you have indicated on this diagram, Plaintiff's 1, and your mark P-2, you say there [20] was some blood?

A. Yes, on the floor at that place.

Q. Did you make any observation as to where the gun had been fired and where the bullet had gone?

A. I couldn't say in what position the gun was fired or where—other than there was blood on the floor. However, there was a bullet hole discovered in the ceiling of the basement.

Q. In the ceiling of the basement?

A. In the areaway above the—where the gun was.

Q. Above where the gun there?

A. There was no ceiling, but there was a rough ceiling there, the joists—the floor joists and the floor from up above.

Q. Was that about directly—where was that in respect to where that blood was on the floor? In

(Testimony of Kenneth C. Pine.)

other words, where was the bullet hole in the ceiling in respect of where the blood was on the floor?

A. I didn't make any accurate observation other than it was in the same general area.

Q. In other words—— A. Above.

Q. Above the spot of blood?

A. Above where the gun was found.

Q. All right. Did you find in the area of the basement any ammunition? [21]

A. Yes, I did.

Q. Where was the ammunition?

A. There is a bookcase marked on the diagram there. I called it "Shelves"—"Shelving" (witness referring to his notes). And on one of the shelves there was a manila paper sack with some *shelves*, cartridges, two different kinds of cartridges that I recall.

Q. And did you determine whether the cartridges that you found on the shelf were live ammunition—they were live? A. Yes.

Q. Did the live ammunition that you found on the shelf fit the gun?

A. The ammunition on the shelf was of a similar nature, size and markings as the spent cartridge in the gun.

Q. All right. Would you step to the board, please, and mark where that live ammunition was that you found which would fit in the gun?

A. It was on one of the shelves of a series of shelves in this particular corner.

Q. All right.

(Testimony of Kenneth C. Pine.)

A. (Witness designating.)

Mr. Clausen: I will mark that, if the court please, P-3.

(Counsel designating P-3 on diagram, Plaintiff's Exhibit 1 for identification.)

Q. (By Mr. Clausen): Did you make an examination of the gun [22] as you arrived there at the scene that afternoon to determine what number, if any, of shells were in the gun?

A. No, I didn't.

Q. And with respect to the gun itself, did you find any exploded shell in the gun?

A. No, I didn't. I was there when it was found, but I didn't——

Q. Beg your pardon?

A. I was there when the gun was examined, but I didn't find anything in it myself. I didn't check it.

Q. Oh, you didn't do that yourself?

A. No, sir.

Q. What kind of a gun was that, Mr. Pine?

A. To the best of my knowledge it was a .30 caliber rifle, carbine.

Q. With respect to the body of Mr. Houston, did you see where the bullet had gone in the body and had come out of the body? A. Yes, I did.

Q. And where had the bullet entered the body, what area of the body?

A. In the chest area at the front.

Q. Chest near the heart?

A. Just a moment. (Witness referring to his

(Testimony of Kenneth C. Pine.)

notes.) Somewhere in the chest area. I didn't take any measurement or exact——

Q. In respect of where the bullet came out, where the shell came out of the body, did you find where that was, Mr. Pine? [23]

A. It was in the area of the shoulder blades, to the rear, the bottom of the shoulder blade area.

Q. In the back, is that correct?

A. In the back.

Q. And so therefore if the bullet had gone through the body in that direction, the body would be parallel to the floor in order that the bullet hole would be in the ceiling, is that correct, so far as the spot of blood in the floor is concerned?

A. I couldn't say exactly on that, no. I didn't——

Q. All right. What type of floor was that, Mr. Pine?

A. As I recall, it was a wooden floor.

Q. All right. May I see that diagram that you say—. This was drawn at the time, was it?

Q. On the afternoon when you were there?

A. Yes. (Witness producing and handing counsel.)

Q. Would you tell me, what is the writing on there and what that refers to?

A. The writing down below refers to——

Q. May I first ask you to start——

A. The marks——

Q. May I ask you to start at the top. What is this number over here, Mr. Pine?

(Testimony of Kenneth C. Pine.)

A. That's H78079, which is the police department case file number.

Q. All right. And then immediately below that is the diagram? [24] A. Yes.

Q. The diagram to which you referred, is that correct? A. That's right.

Q. And that indicates the approximate positions of the body and the gun, is that correct?

A. Yes.

Q. Where you have drawn in this upper left-hand corner a little sort of a rectangle and put an X, what does that indicate on your diagram?

A. I drew a rectangle and put an "A" in it and down below the "A" it says "Ammo in paper sack."

Q. In other words, that indicates, does it, where you found the ammunition? A. Right.

Q. All right. Now, on this same sheet of paper, on the page to which we have been referring, there is this figure X-1. Now, "X-1" is what?

A. Well, I have this diagram sectioned off in three sections because—three different levels of the floor. "X-1" the level of the floor is raised approximately fourteen inches from the main level. By that I mean you can stand up straight in the main level, the large section of the room on the south—

Q. In other words—

A. West side.

Q. This section here was raised up how much?

A. Approximately fourteen inches.

(Testimony of Kenneth C. Pine.)

Q. All right. And it was approximately fourteen inches up from this area, was it? A. Yes.

Q. All right. Is that more specifically indicated on your diagram that you are holding in your hand?

A. More specifically indicated?

Q. Yes. You have an "X-1" there.

A. Yes.

Q. Is that what the "X-1" refers to?

A. The "X-1" refers to that.

Q. All right. Now, you have an "X-2." What does that indicate?

A. The section at the northeast of the room was raised higher than fourteen inches. I have approximated it at three and a half feet.

Q. That is this section over here?

A. It is a storage—

Q. Is that correct? A. Yes.

Q. Now, below that figure on your diagram is what, Mr. Pine?

A. Well, I have a "G" to indicate the mark or position of the gun.

Q. All right. Then underneath that?

A. Then the "A." [26]

Q. And then underneath that?

A. Underneath that I made a note regarding the body lying face down, both hands underneath, wound at front breast, and then exit wound. That is as far as that, the exit wound, was apparent. In other words, I knew there was a wound at the front of the breast plus an exit wound at the rear.

(Testimony of Kenneth C. Pine.)

Q. All right. Now, then, on the reverse side of this note that you made at the time is some writing. What does that say, Mr. Pine?

A. When the coroner—deputy coroner arrived, Mr. Osborne, he picked the gun up and examined it and said from the markings on it that it was a 1894 Winchester, caliber .30, WPCP lever action repeater, one cartridge in the chamber. Description of the cartridge in the chamber, which was a spent cartridge, Super X 30-30 Winchester. Yellow metal.

I made a notation, "Yellow metal," as it was colored that, probably brass.

Q. All right. Would you hold those a moment?

Your Honor, this diagram identified by the witness I will offer in evidence as Defendant's 1.

The Court: It will be admitted and marked next in order.

The Clerk: Defendant's Exhibit A marked in evidence.

(Thereupon diagram produced by Mr. Pine, received in evidence and marked Defendant's Exhibit A.)

Mr. Clausen: Q. Have you in your hands [27] or otherwise any notes made at the time, Mr. Pine?

A. Yes.

Q. What are they?

A. Names and addresses, phone numbers of deceased, wife, his mother-in-law, one daughter, the family doctor, the deceased's business occupation, and then the name of another daughter who lived in Berkeley, a married daughter.

(Testimony of Kenneth C. Pine.)

Q. And this information that is set forth on the sheet that you just now handed me, you obtained from whom?

A. From the members of the family, the daughter and Mrs. Houston.

Q. And Mrs. Houston, who is now Mrs. Clayton? A. Right.

Q. All right. And did you have a talk with her —. Well, of course you did. You obtained this information from her? A. Yes.

Q. On that occasion was anything said by you to her or she to you concerning the apparent motive of the suicide, any questions of his action and conduct of late? A. Yes.

Q. All right. Now, who was present when that statement was made, Mr. Pine?

A. What statement?

Q. The statement by Mrs. Houston to you concerning the subject that I just now asked you about. [28]

A. Well, there was much conversation. I don't—I can't say just who was present at any one time. There was quite a bit of conversation.

Q. I understand.

A. Between all of us.

Q. What did Mrs. Houston say to you on that subject, Mr. Pine?

A. I asked Mrs. Houston if her husband had at any time threatened suicide.

Q. Yes. A. And she said no, he hadn't.

(Testimony of Kenneth C. Pine.)

A. And I asked her if he had been planning on doing any shooting or going on a hunting trip.

Q. Yes. A. She said he hadn't.

Q. Yes.

A. I asked her if he had been under any emotional stress or if he had any problem of late that would cause him to do a thing like that, and she said—at the beginning she said that he had at times suffered periods of depression.

Q. Periods of depression at times?

A. Yes.

Q. And what else did she say on that subject, Mr. Pine?

A. She said, however, he was in fine spirits over the past weekend, he had been in good spirits of late except that he [29] was working hard, working long hours getting out some reports which were a yearly function with his—in his business.

Q. Working hard, long hours, getting out reports that were business reports connected with his business, is that correct? A. Yes.

Q. Now, these periods of depression to which she referred, did she state whether those periods of depression occurred coincident with his work in getting out such reports for his business?

A. Well, I just didn't—she didn't elaborate and I just didn't gather what her actual meaning was by "periods of depression." She said he was under stress at times, like these, when he was preparing these reports.

Q. I see. Do you have any other notes there

(Testimony of Kenneth C. Pine.)

that you made at the time? A. Yes, I have.

Q. Are those all made at the time?

A. Yes.

Q. I see.

A. Merely that Miss Houston said her father came downstairs about two.

Q. Miss Houston, the daughter?

A. I talked to Miss Ann Houston.

Q. All right.

A. Then I have a note here—— [30]

Q. Pardon me just a moment. She stated to you that her father had gone downstairs about two o'clock?

A. Had come downstairs from his bedroom. He had been in bed all morning.

Q. Had been in bed all morning? A. Yes.

Q. And came downstairs about two o'clock, is that correct? A. About two o'clock.

Q. You arrived at the scene what time?

A. It was approximately 2:15.

Q. About 2:15? A. Yes.

Q. What else is set forth in your note that you made at the time, Mr. Pine?

A. The name of the deputy coroner who arrived, took the body.

Q. All right.

A. Plus the ambulance crew.

Q. Did they take the man's body away while you were there?

A. No. The Coroner took the body away while I was there.

(Testimony of Kenneth C. Pine.)

Q. All right.

A. The ambulance did not.

Q. In other words, it was not an ambulance case because the man had already—had died?

A. Dr. Lyman pronounced him dead.

Q. Dr. Lyman—was he the family physician?

A. I gathered he was. He had been called by the family.

Q. What else is on your notes, Mr. Pine?

A. This page refers to March 29th, '54, when the Berkeley Police Department gave the rifle to an attorney for Mrs. Houston. It is merely a receipt for the rifle.

Q. Gave to an attorney for Mrs. Houston what, Mr. Pine? A. The rifle that was used.

Q. The rifle?

A. At the scene of the Coroner's inquest, I turned the rifle over to an attorney named Allison.

Q. All right. Mr. Allison? A. Yes.

Mr. Clausen: I will ask counsel if he has the rifle.

Mr. Angell: Yes, I have the rifle.

Mr. Clausen: Will you produce it, please?

Mr. Angell: I will be very happy to.

Mr. Clausen: All right.

A. That's the extent of the notes.

Mr. Clausen: All right. Thank you, Mr. Pine.

Your Honor, if I may—

Q. Could you put those in the order in which you had them at the time you handed them to me?

A. There is one other page.

(Testimony of Kenneth C. Pine.)

Q. That has already been introduced in evidence, which is the diagram. [32]

A. Well, that's the way they were.

Mr. Clausen: May I offer these in evidence? I do offer them in evidence and I would suggest that they be considered part of Defendant's Exhibit A and attached to that exhibit.

The Court: They may be admitted and marked as next in order.

Mr. Angell: No objection.

The Clerk: Defendant's Exhibit A, attachments.

(Documents attached to map previously marked Defendant's Exhibit A.)

Mr. Clausen: Q. Were some pictures made at the time, Mr. Pine?

A. Yes. The police photographer took pictures of the body.

Q. And police connected with the same department, the Berkeley Police Department?

A. Yes.

Q. Are those pictures retained in the file of the police department? A. Yes, they are.

Q. And they would be subject to the same procedure that you have indicated for subpoena; in other words, the same officer would have control of those? A. Yes.

Mr. Clausen: You may take the witness. [33]

Cross Examination

Mr. Angell: Q. Is it true that it is the department procedure, Officer Pine, that the Berkeley

The Court: We are going to take a recess.

(Short recess taken.)

Mr. Angell: Before you call Parker, may I ask Officer Pine to remain in the courtroom? I would like to ask permission of the court, counsel asked one question of Officer Pine, which I neglected to answer. I can do it after Inspector Parker is finished.

Mr. Clausen: I suggest you do it now. I was going to ask permission of the court to ask Inspector Pine a question also.

KENNETH C. PINE

recalled as a witness on behalf of the defense; previously sworn.

Redirect Examination

Mr. Clausen: Q. I wanted to be sure I asked you this question, Mr. Pine. At the time the body was found how was Mr. Houston dressed?

A. He had on pajamas and a robe.

Q. Pajamas? [36]

A. Pajamas and a robe and slippers.

Q. Pajamas, robe and slippers? A. Yes.

Q. All right. Now, this diagram that was furnished by plaintiff has indicated here where you put the rifle "Hole cut in floor"—I am pointing to a rectangle. At the time that you observed the premises, was there any hole then cut in the floor?

A. No, that hole hadn't been cut in the floor.

Q. Can you tell me at the point where the rifle was found the approximate height of the ceiling from the floor?

(Testimony of Kenneth C. Pine.)

A. Approximately five and a half feet to the floor joists above.

Q. Can you tell me, Mr. Pine, when you saw the gun was the lever of the gun, the hammer, was that closed down against the shell which had been spent?

A. I didn't examine the gun that closely.

Mr. Clausen: You may take the witness.

Recross Examination

Mr. Angell: Just one question.

Q. Referring again to the bag of shells which you stated you found on the bookcase shelf in the northwest corner of the basement as shown by the red mark P-3. Do you recall whether that bag of shells was open when you found it or was it closed?

A. It was closed. I had opened it to look in. [37]

Q. You had opened it to look in? A. Yes.

Mr. Angell: Thank you.

Mr. Clausen: That is all, Mr. Pine.

(Witness excused.)

EDWIN H. PARKER

recalled as a witness on behalf of the defense; previously sworn.

Direct Examination—(Resumed)

Mr. Clausen: Q. You were one of the officers and you have already been identified.

Mr. Parker, you have given me some rough notes here and I will return these notes to you and ask you if you can tell me this: When you arrived at the

(Testimony of Edwin H. Parker.)

scene did you make an examination of the body and see the wound in the body?

A. I made an examination of the body without moving it at the time I first arrived and after the arrival of the Coroner's deputy, a man named Osborne. The body was turned over and in my presence by him.

Q. The body was turned over? A. Yes.

Q. Yes.

A. I made an examination of the wound at that time and found a rather large opening in the chest area near the midline of the chest. (Indicating.)

Q. Indicating about where? [38]

A. About (witness indicating).

Q. The region of the heart?

A. In the vicinity of the heart. It was a little off to one side of the midline, but it was right in the general area of the heart.

Q. Yes.

A. The opening was rather enlarged, indicating considerable blast, muzzle blast from the gun, and the area around the hole was blackened from powder.

Q. In other words, you are speaking now of the entry hole, which would be in the front chest, is that right?

A. Yes. Both the clothing remaining over the wound and the skin itself showed evidence of blackening from the blast.

Q. Does that indicate that the muzzle of the gun

(Testimony of Edwin H. Parker.)

was on or near the chest at the time the gun was fired?

A. Either pressing against it or extremely close, enough so that it had the same effect as if it were against the body or the clothing.

Q. Now, the wound or the exit wound in the back, that was where, Mr. Parker?

A. It was higher up on one shoulder—well, the bullet hadn't quite gone straight through but a little bit.

Q. Could you indicate on me—show the entry wound—show where the entry wound was, approximately.

A. The entry wound was approximately in this area here [39] (indicating).

Q. Right here?

A. And the exit wound was close to one of the shoulder blades. It may have touched one of the shoulder blades. I don't recall which one it was.

Q. All right. So with that in mind, for the bullet to have gone through the body in this position and come out overhead at the ceiling, the body would have had to be leaning over like this, isn't that correct (demonstrating)?

A. That's correct.

Q. Did you notice any blood at the place where you found the gun?

A. Yes, there was a little blood on the floor at the point where the gun was found and there was also flecks of blood and bits of clothing in the ceiling, around the bullet hole in the ceiling.

(Testimony of Edwin H. Parker.)

Q. In the ceiling. And was that bullet hole approximately overhead from where you found the rifle?

A. Yes, it was approximately overhead, not exactly. I didn't measure the exact distance.

Q. Now, with reference to the rifle, Mr. Angell has it and I have asked that he bring it here. But can you tell me this, is it possible for a man of, say, the height of the deceased in this case, to have put the muzzle of the gun against his front, like this, to have leaned over and to have reached down [40] and pull the trigger?

A. Yes, it would have been possible.

Q. All right. The exit wound that you observed in the back, Mr. Parker, how did that differ from the entry wound that you observed in front?

A. Well, there was no muzzle blast around it.

Q. The exit wound in the back, there was no blast?

A. That is correct.

Q. All right. Now, the gun itself had how many shells in it, or did it have just the one shell that was the cause of death?

A. It had only the one exploded cartridge in it, no others, in the gun.

Q. And the hammer action on the gun, the lever action, was that shut and closed?

A. The lever action was closed and the hammer was down in the discharged position.

Q. In the discharged position. All right. Then overhead where the bullet hole was in the ceiling, did you notice anything around that bullet hole?

(Testimony of Edwin H. Parker.)

A. Yes. There were flecks of blood and little bits of fabric from the clothing.

Q. Did you go upstairs and try to find the spent bullet?

A. No, I didn't. I didn't realize until later that the bullet had gone through the floor. [41]

Q. All right. Can you give me the approximate distance from the floor to the ceiling at the point where the gun was found?

A. I didn't measure it, but it was under six feet, because I had to stoop over. I'm 5-11; I couldn't stand up in the area without bending over.

Q. All right. Now, with reference to the other marks on the diagram here. Officer Pine has put the position of the body when he saw it, in this position, and that is indicated as P-1.

May I explain this diagram. Would you step down here a moment, Mr. Parker?

This indicates the basement section of the home, the Houston home, and it was explained to Mr. Pine as being north in this direction; there are the stairs coming down from the kitchen; there is this basement area which Mr. Pine stated was a little lower than the area here.

Can you tell me where the body was, about, when you saw the body on your arrival?

A. It was in the approximate position as marked by Officer Pine.

Q. P-1, is that correct? A. P-1.

Q. And then with reference to where the gun

(Testimony of Edwin H. Parker.)

was, can you tell me where it was when you saw the gun? [42]

A. In the same approximate position marked by Officer Pine.

Q. The same as Officer Pine.

Then did you find some live ammunition of the area of the gun?

A. No, I didn't see the ammunition.

Q. All right.

You may take the stand, please.

Then, Mr. Parker, when you were there were there some pictures taken by the police department or anyone else?

A. Yes, there were pictures taken by Officer Wylan.

Q. A member of the Berkeley Police Department? A. Yes, he is.

Q. Now, the procedure that you follow normally, Mr. Parker, in connection with—or that you did at the time of the occurrence here in February of last year—what was it? What was that in reference to your official reports?

A. A report is made by the officers involved and then it is referred to the Coroner, and the Coroner's Office in Alameda County arrives at a decision as to verdict either by the Coroner himself or by impanelling a coroner's jury.

Q. Then your report was filed with the police department, was it? A. Yes, it was.

Q. Did the Deputy Coroner arrive while you were there? A. He did. [43]

(Testimony of Edwin H. Parker.)

Q. And that was the gentleman you mentioned as being named Osborne? A. That's right.

Q. Can you tell me who, if anyone, unloaded the rifle in your presence?

A. The Deputy Coroner, Osborne, unloaded it in my presence, and I think Officer Pine was also present at the time.

Q. And you observed what in reference to what was in the gun?

A. I observed there was one exploded cartridge in the chamber and none in the magazine.

Q. Was the man dead on your arrival?

A. Yes, he was dead.

Q. You got there about what time?

A. About two-thirty in the afternoon.

Mr. Clausen: You may take the witness.

Cross Examination

Mr. Angell: Q. Inspector Parker, did I understand you stated as to procedures that you made your report and then you referred it to the Coroner?

A. That's right.

Q. The Coroner would either make a report or finding or call for a coroner's inquest, is that correct? A. That's correct.

Q. And in this case did you make any recommendations with respect to whether there be an inquest or not? [44]

A. Yes, in this case I did request that it be inquested by a coroner's jury rather than without testimony.

(Testimony of Edwin H. Parker.)

Q. Was such an inquest held?

A. There was such an inquest subsequently held by a coroner's jury.

Mr. Angell: I think that is all.

Mr. Clausen: Just one question.

Redirect Examination

Mr. Clausen: Q. Mr. Parker, I don't know whether I asked you, but I will ask you again: You have told us that the powder blade in the front was—. Was the hole in the front larger than the hole in the back of the body?

A. My recollection is that it was larger, but I couldn't be positive about that; but I know that the point of entry was much larger than the caliber of the bullet which had made the hole.

Mr. Clausen: I see. All right. That's all.

Mr. Angell: Thank you.

(Witness excused.)

Mr. Angell: Here's the gun, if you want it.

Mr. Clausen: May I recall the two witnesses to identify the gun, your Honor?

Mr. Angell: We will stipulate that it is the gun.

The Court: Let the record show that there is this stipulation. [45]

Mr. Clausen: Very well, your Honor.

We will offer this (gun) in evidence as Defendant's next in order.

The Court: It will be admitted as next in order.

The Clerk: Defendant's Exhibit B admitted and filed in evidence.

(Thereupon rifle received and marked in evidence as Defendant's Exhibit B.)

Mr. Clausen: We will call Mr. Wainwright.

As far as the defendants are concerned, your Honor, the officers, Pine and Parker, may be excused temporarily, to be recalled when we get those records from the police department, in the event it is necessary.

The Court: Did you hear that, gentlemen?

You will notify them?

Mr. Clausen: I will get in touch with both gentlemen when we make arrangements for the records.

JAMES H. WAINWRIGHT

called as a witness on behalf of the defense; sworn.

The Court: Your full name, please.

A. James Hamilton Wainwright.

The Court: Where do you live, Mr. Wainwright?

A. Toronto, Canada.

The Court: Your business or your occupation?

A. Assistant secretary and claims officer of The Canada Life [46] Assurance Company.

The Court: What company?

A. Canada Life Assurance Company.

The Court: Take the witness.

Direct Examination

Mr. Clausen: Q. In connection with your duties of assistant secretary, to which you have just referred, for the defendant in this case, can you tell

(Testimony of James H. Wainwright.)

DEFENDANT'S EXHIBIT "C"

The Canada Life Assurance Company, Toronto, Canada, Agrees to Pay subject to the Family Income provision Face Amount Ten Thousand Dollars to the beneficiary on the death of Assured William Mark Houston if death occurs prior to 24th September, 1963 (the Expiry Date).

Beneficiary, subject to the Beneficiary provision: Assured's wife, Charlotte S. Houston.

This agreement to pay and the premiums stated below are subject to the provisions on the attached sheets which, together with this sheet, constitute the policy.

Premiums: \$382.70 payable to the Company yearly in advance from 24th September, 1953 during the life of the assured until premiums have been paid for 10 policy years.

Conversion Option: As hereinafter set forth; available at any time during the conversion period, being the period up to the end of the seventh policy year.

Policy years and anniversaries shall be computed from 24th September, 1953.

Issued at the Company's Head Office at Toronto, Canada, as of 3rd November, 1953.

/s/ E. C. Gill, President

/s/ W. J. Adams, Secretary

/s/ T. R. Price, Assistant Registrar

(Testimony of James H. Wainwright.)

10 Year Term, Convertible within 7 years. Non-Renewable. Assurance payable at death if within 10 years. Premiums payable for 10 years or until prior death. Age 50. Non-Participating. Family Income Provision.

* * * * *

Suicide. During the first two years from the date of issue of this policy, suicide (whether the assured be sane or insane) is a risk not assumed under this policy; should death occur in such manner that the assurance is not effective because of the operation of this provision, the Company will pay an amount equal to the premiums paid under this policy, which amount will be paid in one sum to the person or persons who would have been entitled to the net proceeds of this policy or the first payment therefrom had this policy matured by reason of the assured's death.

* * * * *

Commutation. A beneficiary shall not have the right to commute, or alienate or assign his interest in, any payments of the guaranteed income provided for in this provision unless such right is given to such beneficiary by a writing signed by the assured and deposited with the Company at its Head Office; nevertheless, the executors, administrators or assigns of the assured or the executors or administrators of any beneficiary shall have the right, at any time when they are entitled to receive any payments provided for in this provision, to commute all the remainder of such payments to

(Testimony of James H. Wainwright.)

which they have title. Any such commutation will be made on the basis of interest at $2\frac{1}{2}\%$ per annum, compounded yearly.

* * * * *

Mr. Clausen: Q. Now, with regard to that portion of the application, Mr. Wainwright, part two, which says: "Statement of health—Medical"—

The Court: What page is that?

Mr. Clausen: Question 6. Would you show the court where that is, Mr. Wainwright?

(The witness indicating to court.)

Mr. Clausen: Question 6 is:

"A. To what extent do you use alcoholic stimulants?" And what answer was given to that by Mr. Houston, the applicant in this case, the assured?

A. The answer is given "Yes." And enlarged with the note: "Socially only occasionally."

Q. And Question B: "Have you ever used them to excess?" What did Mr. Houston answer to that?

A. He answered "No."

Q. Is there a subscription to the above answers at the bottom: [49] "The answers recorded above are as given by me and are complete and true"?

A. That is correct.

Q. Is that stated there by Mr. Houston?

A. That is stated there by and signed by the signature of Mr. Houston.

Q. That's the signature that follows, is that correct? A. Yes.

(Testimony of James H. Wainwright.)

Q. Let me ask you, did the company rely upon those statements of Mr. Houston in issuing that policy?

Mr. Angell: Just a minute. May I put in my objection before that is answered?

The Court: You may.

Mr. Angell: Object to it as incompetent, irrelevant and immaterial, not within the issues in the case, calling for the opinion of the witness on something which is clearly not subject to opinion evidence, and is a matter of law for this court to determine from all the evidence that goes in whether it was a material misrepresentation. It is not a proper question to ask this witness if they would have written this if the statements there were untrue. That is for your Honor to determine, whether from all the evidence as is in here whether those were material misrepresentations, and, if so, whether they were such material misrepresentations as to void the policy as fraud, because it is absolutely necessary under [50] the cases in California, and I think there is no question but what this case is governed by California law, that in order to defeat the payment under an insurance policy it is absolutely incumbent upon the insurer not only to show that there were misstatements or misrepresentations but to also show that they were material and that they would have, in the opinion of the court or the jury which passes upon that question and not the witness, as to whether they believe that that

(Testimony of James H. Wainwright.)

policy would have been written had it not been for ——

Mr. Clausen: Your Honor, all that I am asking is the witness's reliance, and the witness is the man that testifies as to the corporation; the corporation can only speak through its agents; and we are merely seeking to show here reliance by the witness upon the application of the applicant.

Mr. Angell: If your Honor please, may I ask a couple of questions before I put in another objection?

The Court: You may.

Mr. Angell: Q. Did you ever see this policy at any time, this application, prior to the date of Mr. Houston's death? A. No.

Mr. Angell: I don't think I need to ask any more questions as to whether they relied upon those representations.

Mr. Clausen: It wouldn't make any difference, your Honor, because the witness has already testified his knowledge of the practices and the knowledge of the company, and the acceptance, [51] rejection, rejection of life insurance risks, his work in the field of underwriting, and so based upon that and the information he has I think I am entitled to ask the question which I did, a very simple one, whether in the whole scope of his knowledge the company for whom he speaks relied upon the application.

Mr. Angell: If your Honor please, I make the further objection, it would be premature. There is

(Testimony of James H. Wainwright.)

no proof at this stage of the game that there is anything that is in there that is stated that isn't true.

Mr. Clausen: All right. If that objection is made, I will withdraw the question at this time and call the witness back. I was only trying to save time, your Honor.

The Court: There is nothing before the court.

Mr. Clausen: That's right.

Q. Now let me ask you this, Mr. Wainwright: Following the death of the assured, did you tender and did the company tender to the plaintiff the unpaid premiums pursuant to the policy in the sum of—the paid premiums in the sum of \$382.70?

A. We did.

Q. And was that tender rejected?

A. It was.

Q. Did you, Mr. Wainwright, for purposes of illustration and in the light of testimony—rather, in light of information derived from the police department, such as Officers Pine and [52] Parker this morning, construct a model in respect of the gun and construct that model in such a fashion as to give allowance to the height of the deceased and to the length of the gun? A. I did.

Q. Do you have the figure there? A. Yes.

Q. And the figure—may I see it, please?

A. (Witness producing a manikin.)

Q. Did you assume in that model, Mr. Wainwright, the known height of the deceased of six feet two and a half inches?

A. Yes. I took the height of this artist's lay

(Testimony of James H. Wainwright.)

figure, as it is called, your Honor, as six feet two and a half inches, recorded height of Mr. Houston. Using that as the scale, I then took a picture, an accurate picture of the gun, and constructed a model rifle, which would be the length of the rifle in this case as known to me, in proper scale to this figure, being the height of Mr. Houston.

Q. And that gun is constructed to that same scale, is it? A. It is.

Q. Now, then, further with reference to the evidence that was available, did you direct the course of the bullet through the chest, established by the postmortem examinations?

A. I did. Taking the information given at the coroner's inquest, I drilled a hole through the chest of this model at the place and in the direction as disclosed by the evidence [53] given at the coroner's inquest.

Q. And based upon the information of powder burns or marks on the clothing and body of the deceased showing the muzzle of the rifle to have been close to the heart area and resting against or immediately near it when discharged, did you reconstruct that rifle position in respect of that model?

A. I reconstructed the rifle position based on the powder burns on the chest, the line of the bullet through the chest and the line of the bullet or the approximate position of the rifle when the bullet discharged.

(Testimony of James H. Wainwright.)

Q. And will you assemble those in that position; you can do it right there, if you will.

A. This, your Honor, is what I constructed——

Q. In reference to the vertical position of the rifle, did you determine that from information such as that given this morning by the police department?

A. I first determined that from the evidence taken at the coroner's inquest, where testimony was given as to how many degrees off vertical the rifle was in two directions.

Q. All right.

A. (Witness demonstrating with scaled manikin and rifle.)

Mr. Clausen: We have that for purposes of illustration, your Honor.

You may take the witness.

Mr. Angell: Are you offering that in evidence or —— [54]

Mr. Clausen: I do. I offer the figure and the rifle in evidence for illustration—purposes of illustration, your Honor.

Mr. Angell: May I ask just one or two questions before you do?

The Court: Yes.

Cross Examination

Mr. Angell: Q. Mr. Wainwright, as I understand it, you have taken the evidence offered by Dr. Kirk and Mr. Bradford on the course of this bullet.

A. That is, what I had available to me.

(Testimony of James H. Wainwright.)

Q. All you have done is take that and with that you physically made this model, is that correct?

A. Well, not with that testimony. That testimony positions the rifle as I have set up there.

Q. You have taken that testimony and you have made physically this manikin here, is that correct?

A. Well——

Q. To illustrate the testimony——

A. I think——

Q. The testimony given at the coroner's inquest.

A. The rifle is made to the scale, and the length of it is accurate to scale, according to this figure.

Q. I see.

If this material is merely being offered in connection [55] with something that you are going to offer, Mr. Clausen, in the form of testimony, in the way of illustration, why, I am not going to raise the objection to it, but if it is going to be offered to prove that that was in fact the——

Mr. Clausen: No, no, this is offered just like a map, for illustration.

Mr. Angell: All right. If it is only for illustration, because I want it perfectly clear no foundation has been laid as to this witness to show that he made any examination of the body, made any examination of the bullet, made any examination of anything other than he went and looked at some testimony at the coroner's inquest, which testimony is not before this court and which is not admissible before this court, and then he has made this little statue and put it up there. Now, if this is merely

(Testimony of James H. Wainwright.)

preliminary to something that is going to be put in here further by you, I don't want to block your case, and you cannot put it in all at once, and I will make no objection to it at this time if it is only by way of illustration, as you say; then I have no objection to it.

The Court: Let it be admitted for that purpose, and limit it for that purpose.

Mr. Clausen: Yes, your Honor.

The Clerk: Defendant's Exhibit D admitted and filed into evidence.

(Manikin and scaled rifle received in evidence for [56] purposes of illustration and marked Defendant's Exhibit D.)

Mr. Clausen: Any further questions, Mr. Angell?

Mr. Angell: I think not.

Mr. Clausen: You may step down, Mr. Wainwright.

(Witness excused.)

Mr. Clausen: Mr. Youngers.

PAUL W. YOUNGERS

called as a witness on behalf of the defense; sworn.

The Court: Your full name, please.

A. Paul W. Youngers.

The Court: Where do you reside, Mr. Youngers?

A. Los Altos.

The Court: Your business or occupation?

A. I am with the New Zealand Insurance Company.

(Testimony of Paul W. Youngers.)

The Court: New Zealand Insurance Company.
Take the witness.

Direct Examination

Mr. Clausen: Q. How long, Mr. Youngers, have you been with the New Zealand Insurance Company?

A. It will be three years this coming January 1st.

Q. Your duties at the present time are what, Mr. Youngers? A. Casualty superintendent.

Q. And that has to do with the litigated claims and the adjustment of claims, does it?

A. Yes. And underwriting and production. [57]

Q. In connection with your work with that concern, did you become acquainted with the deceased in this case, Houston—Mr. Houston?

A. Yes; just about three years ago, right about now.

Q. And what was his position with the firm, Mr. Youngers?

A. He was the United States manager.

Q. And when you say "United States manager," his job encompassed, did it, managing the whole of the United States, with offices here in San Francisco? A. That's right.

Q. And that was for the New Zealand Insurance Company, which is, as the name indicates, located in New Zealand, so far as its home office is concerned? A. That's correct.

(Testimony of Paul W. Youngers.)

Q. How long had Mr. Houston had that job, do you know, at the time he died?

A. Well, I don't know of my own knowledge, but I understand around five, six years.

Q. And do you recall, Mr. Youngers, that the general nature of the work performed by Mr. Houston—do you recall the general nature of that work?

A. Well, he was the manager in all respects.

Q. Were there occasions when you would make field trips with him?

A. I made one field trip with him, yes. [58]

Q. And just to give us a sample of the kind of an individual he was—well, just tell us briefly what happened on that one field trip.

A. Well, let's see—it was three years ago—no, two years ago this Armistice Day that is just coming up. We made a field trip to Oregon, went up through Northern California, up through Klamath Falls, up into Portland, then up into Woodland, Washington. At that point we parted; I went on north to Seattle and he went back to San Francisco.

Q. He called for you, like you testified in the deposition, at six o'clock at the Claremont Hotel in Berkeley?

A. That's correct. I stayed overnight at the Claremont Hotel and he called for me in the morning.

Q. And he drove all that day up to Klamath Falls, Oregon, isn't that right?

(Testimony of Paul W. Youngers.)

The Court: New Zealand Insurance Company.
Take the witness.

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(Testimony of Paul W. Youngers.)

A. We drove up to Klamath Falls, Oregon, got there, oh——

Q. In the afternoon?

A. Two, three in the afternoon.

Q. About two or three o'clock in the afternoon. And in the long series of activities there that you and he engaged in at that time, it was he who wore you out, isn't that right?

A. Well, he was a very vigorous man. I'll put it that way.

Q. All right. Now, do you recall also, shortly before he died, an episode which disturbed Mr. Houston, respecting an accident he had had when he was going over the state line from [59] Oregon into California?

Mr. Angell: Just a minute. May I hear that question read back?

(Question read back by reporter.)

Mr. Angell: I object to the question on the ground that it assumes a fact not in evidence, that there was anything that disturbed Mr. Houston.

The Court: The objection will be sustained. Reframe your question.

Mr. Clausen: Q. Well, isn't it a fact, Mr. Youngers—let me put it this way: Do you recall an episode when Mr. Houston was involved in an accident and telephoned to you?

A. Well, that wasn't an episode. It was an accident that occurred up in southern Oregon some place, yes.

(Testimony of Paul W. Youngers.)

Q. And the accident to which you refer occurred when, Mr. Youngers?

Q. I would say the latter part of October, two years ago.

Q. On that occasion did he not state to you that he was disturbed about the situation?

A. Well, disturbed—he had an accident, yes, and he was unhappy with it and he wanted me to help him do something about it, of course.

Q. It was handled in an unusual fashion, was it not, in that a woman in the car was paid off in cash?

Mr. Angell: Just a minute. Your Honor, I am going to [60] object to these questions as leading. This witness is Mr. Clausen's and I think he can easily ask what was said and what was done without leading the witness or suggesting the answer, and I am going to request that.

The Court: It is leading and suggestive. Reframe your question. Objection sustained.

Mr. Clausen: Q. Mr. Houston, as I understand it, telephoned to you; you were here in San Francisco.

A. That's right.

Q. What did he ask you to do?

A. Well, he——

Q. Concerning the accident, of course.

A. Well, he reported the accident to me; the accident occurred in southern Oregon near Lakeview, Oregon, and he reported to me in the course there were two problems involved, there was a collision damage to his automobile, which was the part

(Testimony of Paul W. Youngers.)

I was to take care of, and I was to report the liability feature of the case to the London Guarantee Company, I think is the name of it, which I did immediately.

Q. Now, with reference to the report given to you by Mr. Houston, did he tell you who were the occupants in the car at the time of the accident?

A. Yes. He had two passengers in the car; one was a gentleman by the name of Irby from Atlanta, Georgia, an agent of the New Zealand Insurance Company, and a young lady was in [61] the car.

Q. Did he tell you where they had been and where he was going at the time the accident happened?

A. Briefly on the phone. I got most of the stuff later. He had been going from Lakeview down to some point in California, but I don't think they ever made it.

Q. In other words, he was going across the state line from southern Oregon into Northern California, is that correct?

A. That is what his intent was, as I understand.

Q. And in this car there was this woman and this man who also worked for the New Zealand Insurance Company?

A. No, he didn't work for me. He was an agent, a general agent.

Q. An agent for them? A. Yes.

Q. All right. Did he tell you who this woman was?

A. He may have. I don't remember.

(Testimony of Paul W. Youngers.)

Q. In his conversation with you concerning the woman and in his conversation with you, how soon after this accident was that?

A. That was the following morning. The accident happened the preceding night. The following morning, yes.

Q. And then what did you do after you talked with Mr. Houston, so far as this woman was concerned?

A. Well, I didn't do anything directly as far as this woman [62] was concerned. I went over and reported the matter to the London Guarantee & Accident Company, and Mr. McNally—and we jointly assigned the investigation to an adjuster at Klamath Falls.

Q. Yes. Then after that was done, after you had assigned it to Klamath Falls, what was done with the woman?

A. The adjuster went over——. Of course I learned this afterwards; I wasn't there. The adjuster went over to Longview—Lakeview—and settled the case.

Q. And did you arrange for her to be paid in cash?

A. I made no arrangements. That was done by the adjuster.

Q. You know that she was paid in cash, do you not? A. I do know that, yes.

Q. And you know she was paid in cash quickly, isn't that correct?

A. I would say quickly, yes.

(Testimony of Paul W. Youngers.)

Q. And would you not say that—I will ask you this question: From your experience and knowledge, as well as your information on this specific case, would it be usual to settle the claim that quickly?

Mr. Angell: Just a minute. I object to this line of questioning now unless the materiality of this be shown in connection with either of the defenses here, your Honor.

Mr. Clausen: I am showing this in connection with motive, your Honor, possible motive in suicide, which courts have [63] permitted a wide latitude. This is one, your Honor, of several motives. One has been explained and testified this morning. I am leading into that too with this witness, your Honor, that the deceased was depressed at this periodic time when these reports were due to the home office, and I am showing this episode of this Oregon incident as another possible motive for suicide—or, I will put it this way, your Honor, a pyramiding effect, pyramiding of trouble and anxiety, or, just as the officer testified——

Mr. Angell: May I state my objection? I have no objection to showing the accident—I have no objection to showing the settlement of the accident, and if any comfort can find its way to the defendant by that, you are entitled to that. I submit, your Honor, that the method of settlement, what conversations were held with this young lady at the time the settlement was made, there is no showing that Mr. Houston was present at that time, that he knew what was said, that he was any party to the

(Testimony of Paul W. Youngers.)

settlement in cash. The evidence is only here by inference that Mr. Houston was insured and that he did what anyone else would do, that he called the insurance company, told them that they had an accident. The witness says that when that information came to him on the morning following the accident, that he went over to the insurance carrier carrying the personal injury and they jointly—the New Zealand apparently was carrying their own insurance, [64] although the evidence does not show that—and that they jointly referred the matter to an adjuster in Oregon. Now they are starting out to show with this witness what occurred up there in Oregon, where the witness was not present, even present, and nothing was heard by this witness except as to the ultimate result. I have no objection to showing they settled the next day or two days or three days, but to go into the incidents occurring up there when neither this witness was present nor was Mr. Houston present, as far as shown by any testimony here before this court, I object to that.

Mr. Clausen: Your Honor, we are trying to show the unusual character of this episode of transporting a woman across a state line, the quick settlement of an unusual character, combined, your Honor, with anxiety, and it is only one step in the case.

May I point out, your Honor, that I certainly cannot prove the entire case in one question and answer obviously.

The Court: The court is prepared to rule. The

(Testimony of Paul W. Youngers.)

objection will be sustained. The foundation has not been laid for the testimony that you suggested.

Mr. Clausen: Q. Now, let me then ask you, Mr. Youngers—

Mr. Angell: Also, your Honor, for the purpose of the record, I wish to make a motion to strike the statement of counsel that this was unusual in transporting a woman over the state line. [65]

The Court: It may go out.

Mr. Clausen: Q. Let me ask you this, Mr. Youngers: Following the telephone call to you from Mr. Houston did you also talk with Mr. Houston concerning the episode and concerning the facts when he got back here?

A. After he returned?

Q. Yes. A. Oh, of course.

Q. That was how soon after?

A. Oh, two or three days, maybe longer, three or four days. I don't remember.

Q. Did you work on the specific claim yourself?

A. No, I never did any of the work on it.

Q. Beg your pardon?

A. I did none of the work on the claim myself.

Q. Isn't it a fact that you communicated with the liability carrier, the carrier that paid this money, this money to this woman?

A. Oh, yes, but I say I didn't handle the adjustment.

Q. Oh, I understand, but you did something. In other words, following your talk with Mr. Houston

(Testimony of Paul W. Youngers.)

you did something, did you not, so far as the liability carrier was concerned?

A. Well, yes, sure I did.

Q. What was that, Mr. Youngers?

A. Well, let's see. Yes, I remember now. In the settlement [66] of the case, as it required raising some money to take care of this release that had been executed, and the adjuster had put up some money, Mr. Houston had put up some money, and that money was reimbursed by the liability carrier to those gentlemen.

Q. That amounted to how much?

A. Around a thousand dollars.

Q. All right. And how quickly was that done, in respect of the accident?

A. You mean the accident itself?

Q. The paying to the woman of cash.

A. Oh, within a matter of, I would say, twenty-four, thirty-six, forty-eight hours.

Q. All right. A. To the best of my memory.

Q. Was there any reason why this method of settling should be made in this case?

A. I wasn't there and I don't know any reason why.

Mr. Angell: Object——. May the answer of the witness be stricken? The witness answered before I had a chance to object, and——

The Court: In any event, he wasn't there and he doesn't know anything about it.

Mr. Clausen: Q. Now, in connection with the same matter, Mr. Youngers, after the accident had

(Testimony of Paul W. Youngers.)

occurred and after the woman had been paid this money and after the settlement had [67] been made, did she sign a release?

A. Well, I never saw it. That wasn't our case. It was another company's, but I assume she signed a release, yes.

Q. Now, following that—in other words, following the payment of money to her—did she then write to the firm and demand more money?

A. Well, to the New Zealand?

Q. Yes. A. Not that I know of.

Q. Did she write to the insurance carrier and demand more money? A. That I don't know.

Q. Isn't it correct that there was information in the office to the effect that she had written in?

A. She had written to Mr. Houston, yes.

Q. And demanded more money, isn't that right?

A. I don't know what was in the letter. I never saw it.

Q. This was after the settlement?

A. Yes, after the settlement.

Q. And what did Mr. Houston say to you was in the letter?

A. He never told me what was in the letter. I never saw it.

Q. What did he tell you about the letter?

A. It was a letter from this young lady.

Q. And when did he tell you about it?

A. Oh, I would say probably thirty days after the accident, [68] thirty, forty days.

Q. What did he say about the letter?

(Testimony of Paul W. Youngers.)

A. Well, he had such a letter and I advised him to turn it over to the other carrier, to his attorney. I had no part in it.

Q. Did he show the letter to you? A. No.

Q. Now, as a matter of fact, Mr. Youngers, your firm, the New Zealand, is subject to periodic visits, is it not, from the home office? A. Oh, surely.

Q. And in this periodic visits from the home office, are there inspections by the people that come from New Zealand?

A. They visit us and go through the business, yes.

Q. I beg your pardon?

A. They visit us periodically, yes, of course.

Q. In connection with the work that Mr. Houston was doing, do you know his habits in respect of taking drinks at noontime?

A. To some extent. I didn't see him very often.

Q. Do you know on the occasions when you did see him drinking at noontime how many drinks he would have and what he would drink?

A. Oh, two or three cocktails I have seen, yes, at noon.

Q. Containing what?

A. Well, alcohol. [69]

Q. Would he drink whiskey?

A. I don't remember, no. I don't remember that detail of it. It would be a cocktail of some kind.

Q. And isn't it correct that you saw him do that on numerous occasions?

A. Not numerous. A half dozen times, I would say. I didn't know him that well.

(Testimony of Paul W. Youngers.)

Q. In other words, your acquaintance with him did not extend to the point of going to lunch with him except more than about half a dozen times?

A. That would be the maximum.

Q. And on the occasions that you did go to lunch with him he would drink in that fashion?

A. Sometimes nothing, maybe one or two or three I would say at the outside.

Q. Then did he ever have occasion, Mr. Youngers—did you ever have occasion to go to dinner with him and drink beforehand?

A. I would say that would be another half a dozen times in the time that I knew him.

Q. On that or those occasions how much would he drink? A. Two or three.

Q. Before dinner? A. Right.

Q. On the occasions that you went to dinner, he would also drink then? [70]

A. Yes, I have already said that.

Q. All right. Now, do you know if Mr. Houston paid more money to this woman who wrote him in this month after?

A. I haven't the slightest idea.

Mr. Clausen: You may take the witness.

Cross Examination

Mr. Angell: Q. Did you ever see Mr. Houston intoxicated. A. I never did.

Q. Did you ever see Mr. Houston in such a condition that he could not do his work for which he was employed? A. I never did.

Mr. Clausen: I object to that as calling for the

(Testimony of Paul W. Youngers.)

conclusion of the witness. In other words——

The Court: It goes to the weight of the testimony. I will allow it.

Mr. Angell: What was the ruling?

The Court: Overruled.

A. I said I never saw him intoxicated, no.

Mr. Angell: Q. Did you ever see Mr. Houston so under the influence of alcohol that in your opinion he was not able to do his work, could not talk intelligently and coherently?

A. I never; no, I never saw such a condition, no.

Mr. Angell: I think that is all.

Mr. Clausen: All right.

(Witness excused.) [71]

Mr. Clausen: Call Mr. Masters.

The Court: We will adjourn until two o'clock.

(Thereupon an adjournment was taken until 2:00 o'clock p.m.) [71-A]

RICHARD B. MASTERS

called as witness on behalf of the defense; sworn.

The Court: Your full name, please?

A. Richard Benfield Masters, 1737 Cedar Street, San Carlos.

The Court: Your business or occupation?

A. Insurance official.

The Court: What is the name of the company?

A. The New Zealand Insurance Company.

The Court: Take the witness.

Direct Examination

Mr. Clausen: Q. Your business or occupation

(Testimony of Richard B. Masters.)

you just informed the court was working for the New Zealand Insurance Company, is that correct?

A. That is partially correct. I think I can enlarge upon that.

Q. Yes, sir.

A. I also work for the South British Insurance Company and the Baloise Marine Insurance Company.

Q. Well, both the British and the Baloise Companies are managed, are they not, by the New Zealand?

A. We act as managers here in the United States.

Q. In other words, your prime employer is the New Zealand Insurance Company? [72]

A. That is correct.

Q. And you have been employed by that company, Mr. Masters, for how long?

A. A little over three years.

Q. During the time up to the point of death of Mr. Houston, was he also employed by that same firm? A. That is correct.

Q. As a matter of fact, during the time that Mr. Houston was employed by the New Zealand Insurance Company did he during that time have the position which you now occupy? A. Yes.

Q. And how long had you known Mr. Houston, Mr. Masters?

A. Just shortly before that; I should say personally not more than two months. Before that I had known him by reputation for some time prior but not personally.

(Testimony of Richard B. Masters.)

Q. When you say two months before——

A. Before I went to work for them. I would say I met him in May of 1952.

Q. All right. How long had Mr. Houston been working for that firm?

A. About six or seven years.

Q. During the period, then, from the time that you went to work for the New Zealand, up to the time of Mr. Houston's death, at least, you continued, did you, working for the New Zealand Insurance Company? [73]

A. Yes, sir.

Q. Now, Mr. Masters, just what were your duties with the New Zealand Insurance Company during the time that you were working for the firm and during the lifetime of Mr. Houston?

A. I had the official position of assistant United States manager.

Q. In other words, assistant to Mr. Houston?

A. That is correct.

Q. In respect of age, were you and Mr. Houston about the same age?

A. Very close to each other.

Q. Therefore, the performance of your own duties—in the performance of your own duties did you more or less review correspondence and accounts and know what Mr. Houston was doing as the manager?

A. Yes.

Q. Your title would be assistant manager, is that correct?

A. Yes.

Q. And the home office is in Auckland, New Zealand, is that right?

A. Correct.

(Testimony of Richard B. Masters.)

Q. Do you recall an occasion in the workings of your firm when a claim was made regarding an accident in which Mr. Houston was involved that happened up in southern Oregon or Northern California? [74]

A. Not officially, I do not.

Q. I beg your pardon?

A. Not officially, never mentioned.

Q. When you say "never mentioned," did you know about it at the time?

A. I was told about it, yes.

Q. And Mr. Houston discussed it with you?

A. Not in the slightest.

Q. I beg your pardon? A. Never.

Q. It came to your knowledge, though, in respect of work that you were doing?

A. That is correct.

Q. Do you recall that no report of that accident was made to your home office?

Mr. Angell: Just a minute. Your Honor, I would object to that question as leading and suggestive.

Mr. Clausen: I will reframe it.

Mr. Angell: I have no objection to him asking whether such a report was made.

Mr. Clausen: I will adopt the suggestion.

Q. Was any report so far as you know made of the happening of that accident to Auckland, New Zealand? A. Yes.

Q. And when was that? [75]

A. I don't have the date at hand, but I know

(Testimony of Richard B. Masters.)

that a letter went down to the general manager informing him that the car had been damaged.

Q. And that was after the happening of the accident?

A. To the best of my knowledge, yes. Yes, it must have been.

Q. Mr. Masters, your deposition was taken in this case, was it not, on July 21st of this year?

A. That's correct.

Q. I refer you to your answer on page 35.

Mr. Angell: The question?

Mr. Clausen: Question on line 24 and the answer on 26.

Mr. Angell: May I ask a question, your Honor? Was that deposition taken by you, Mr. Clausen?

Mr. Clausen: I personally was not there.

Mr. Angell: It was taken by your firm on behalf of your client?

Mr. Clausen: I understand the deposition was taken by all lawyers, and to answer your question directly——

Mr. Angell: The point I am making, if this is an attempt to impeach his own witness—or if it is strictly to refresh his memory, I am not going to complain, but ——

Mr. Clausen: That's exactly what I am doing, your Honor.

Mr. Angell: Well, I don't know what you are going to do, because you are bringing out this transcript; it is a [76] deposition that you took and not one that we took, and I think before the wit-

(Testimony of Richard B. Masters.)

ness is shown this that he ought to be allowed to answer on his own testimony. If it differs, why, I think that we are the ones, your Honor, that have a right to show that difference and not the defendants here who called Mr. Masters as their witness.

Mr. Clausen: Your Honor, what I am doing is refreshing the witness's recollection.

Mr. Angell: It does not appear at this stage that the witness needs his memory refreshed.

Mr. Clausen: I am on the point of doing that, your Honor.

The Court: Ask him the direct question.

Mr. Clausen: Q. Mr. Masters, did you state as follows:

"Q. Was any report, so far as you know, made of the happening of that accident to Auckland?

"A. No."

A. That is correct. When I answered that, that answer was exactly correct, I did not know.

Q. All right. And you state now that the fact is different, is that correct? A. That is correct.

Q. And in what respect is the answer wrong?

A. I was shown a copy of a letter today from our files.

Q. Today you were shown that? [77]

A. Just today, yes, where it showed that this letter had gone down to Auckland mentioning the accident.

Q. What date was that letter?

A. I would have to get the letter to give you the exact date.

(Testimony of Richard B. Masters.)

Q. Do you have the letter with you?

A. I can get hold of it. Have we got it? We don't have it with us. No, I don't have it here.

Q. You did not bring it to court? A. No.

Q. Of whom did you just put that question now, Mr. Masters? A. Miss Hoffman, my secretary.

Q. Also the secretary of Mr. Houston, is that correct? A. Yes.

Q. Will you produce that letter, please, in the morning? A. Yes, I will do that.

Q. Let me ask this question: The Cadillac to which reference was made was a company car, was it not? A. Yes.

Q. By "company car" I mean an automobile belonging to the New Zealand Insurance Company.

A. That's right.

Q. It is a fact, is it not, that Mr. Houston bought a new automobile without asking the company for permission? A. Correct. [78]

Mr. Angell: Just a minute. Your Honor, I object to that question upon the ground that it does not appear as material to any issue in this case.

Mr. Clausen: Oh, yes.

Mr. Angell: I don't know what buying an automobile has to do with the suicide—either suicide or intoxication—and I submit, your Honor, that we are getting so far afield that it is going to take me three or four days to get this out of the record; that is my only reason for trying to keep this record within the issues.

Mr. Clausen: This was fully covered by deposi-

(Testimony of Richard B. Masters.)

Mr. Clausen: This will——

Mr. Angell: May I make an objection?

The Court: Just a minute. What is it?

Mr. Angell: May I make an objection to the form of questions being asked by counsel of their own witness. He refers to a letter and characterizes it as critical and gives [81] names to letters. I submit that is not a proper way to put letters in. Whether they are critical or not is for your Honor to determine. And if they want a letter covering a certain subject, I submit that Mr. Clausen knows the way to get it. We will cooperate in the mere asking for it; you won't need a subpoena duces tecum, as far as anything they need, and I only ask that they be identified and not characterized as—at least until argument—as being critical letters or commendatory letters, or what they are. The documents themselves will speak for themselves.

Mr. Clausen: I have no doubt that that is exactly correct, the letter itself will speak for itself.

Q. Now, Mr. Masters, the letter you just handed me is dated February 5th, 1954, and it is marked as received in the office here of the company on February 15th, 1954, or just one week before the death of Mr. Houston, isn't that correct?

A. You have the document there. I don't have it here.

Q. Mr. Masters, this other letter to which you just referred as having been sent from the home office, did you bring that along with you also?

(Testimony of Richard B. Masters.)

A. I only saw that letter once. I have no idea where it is, if it is still in existence.

Q. Will you look for that, please, and produce that in the morning?

A. If I can, but I doubt that I can. [82]

Q. With regard to the letter that you just handed me, you produced it from your pocket, let me ask you, do you have any other letters or correspondence of a similar character in your pocket?

A. No.

Q. Did you have any special reason why you brought this to court?

A. I was asked to bring it up by your assistant, your son.

Q. My son, is that correct? A. Yes.

Q. And he asked you also to search for some other letters, did he? A. I don't believe so.

Q. I will come to those at the proper time.

Now, Mr. Masters, I will ask you, according to the operating practice of your firm, was it not a fact that the purchase of a new automobile should have been submitted to the company home office?

Mr. Angell: Objected to as incompetent, irrelevant, immaterial.

Mr. Clausen: He would know, your Honor.

Mr. Angell: Incompetent, irrelevant and immaterial to any issue in this case.

Mr. Clausen: He is the manager.

The Court: If he knows, he may answer. [83]
Objection overruled.

(Testimony of Richard B. Masters.)

A. It was customary to refer the purchases to the home office first, yes.

Mr. Clausen: Q. As a matter of routine and practice, therefore, you are familiar with the fact, as general manager, that the question of the purchase of an automobile for the United States manager, which was the office occupied by Mr. Houston, would be a matter that would be submitted to the home office for their approval? A. Yes.

Q. And Mr. Houston did not do that in this case, did he?

A. Not prior to the purchase, no.

Q. And the automobile which was damaged was damaged in the accident which occurred in the northern part of California or the southern part of Oregon, is that correct? A. It is correct.

Q. And when did that accident happen, about?

A. I do not recall. I should say, the latter part of 1954.

Mr. Angell: '53? A. '53.

Mr. Clausen: Your Honor, we will ask that the letter which—. First, I will lay a foundation, if I may.

Q. The letter, Mr. Masters, that you produced from your pocket this afternoon is apparently signed by someone at the bottom as "General Manager." What name is that? [84]

A. O'Brien—W. J. O'Brien.

Q. All right. And what office did he occupy in the New Zealand Insurance Company at the time? The letter is dated February 5th, 1954.

(Testimony of Richard B. Masters.)

A. May I see the letter again?

Q. Yes. (Handing witness.)

A. (Examining document.) He was the general manager.

Q. And by "general manager," Mr. Masters, do you mean the over-all world general manager?

A. That is correct.

Q. So his jurisdiction extended to the United States and any offices throughout the world, is that correct?

A. That is correct.

Q. This being a British company, is that correct?

A. New Zealand.

Q. New Zealand, rather.

We will ask, your Honor, that the letter be marked for identification. I haven't had a chance to read it.

The Court: It will be marked for purposes of identification.

(Letter dated February 5, 1954, New Zealand Insurance Company to San Francisco office, marked for identification Defendant's Exhibit E.)

Mr. Angell: I submit, the letter be given to your Honor to read and then we will make our objection. [85]

The Court: He suggests that you read it.

Mr. Angell: I would suggest that your Honor read it so that we can make our objection and your Honor rule on it.

The Court: I suggest that you read it.

Mr. Clausen: Yes.

(Testimony of Richard B. Masters.)

Q. Can you tell me what portion of this relates to the matter that I have been asking about?

It is a long letter, your Honor.

(Witness examining Exhibit E for identification.)

Mr. Angell: The first paragraph.

The Witness: It is the first paragraph.

Mr. Clausen: (Reading.)

“Company Motor Cars (Subject File)

“1831: I note the purchase of the ‘Cadillac’ car at a cost of \$6,219 in lieu of The Branch Car No. 37, for which a recovery was made under Insurance Policy of \$3,983. I am aware of the circumstances which necessitated the replacement of your car and would have appreciated the opportunity of considering this matter before the new purchase was actually completed. I understand from your remarks in your letter No. 1838 that all future purchases of cars will be referred to head office.”

Q. Now, this letter 1838, Mr. Masters, was that a letter from Mr. Houston? A. Yes.

Q. To the New Zealand? [86]

A. I believe so, yes.

Q. Will you bring that in the morning also?

A. I believe that is the one that you have asked me to bring.

Mr. Angell: Are you offering that letter in evidence?

Mr. Clausen: I am going to study the letter through before I offer it in evidence.

Q. Have you, Mr. Masters, had occasions in the

(Testimony of Richard B. Masters.)

past, during the lifetime of Mr. Houston, to be present when he was eating lunch and dinner, and so forth? A. Yes.

Q. Have you had occasion during that same period of time to be with him on so-called field trips? A. No.

Q. Well, is it your knowledge that he customarily did make field trips as United States manager? A. Occasionally, yes.

Q. When you state "occasionally," how often would he be out of the office for that purpose?

A. I would say four times a year.

Q. And during those periods how long would he be gone?

A. It might be anywhere from the week or two, three weeks.

Q. Do you recall other occasions when you have been with him on luncheon occasions? How often you have had lunch with him?

A. I would say it would vary, but on an average of once every two weeks. [87]

Q. And on those occasions would he take drinks before lunch? A. Yes.

Q. And would he on those occasions drink whisky? A. Yes.

Q. And would he on those occasions drink up to four drinks?

A. That would be a very rare occasion.

Q. Would he on occasion drink up to four drinks?

(Testimony of Richard B. Masters.)

Mr. Angell: Submit it has been asked and answered. A. On occasion, yes.

The Court: It has been answered.

Mr. Clausen: The witness just said now "on occasion, yes."

Q. And how often, Mr. Masters, would Mr. Houston drink up to four drinks before lunch?

A. I would say—you ask for a figure—once every four times that we were out, once a year possibly he would have up to that number of drinks.

Q. On the occasions when you were out with him? A. Yes.

Q. On the occasions when you had dinner with him did you have drinks before dinner?

A. Yes.

Q. And on those occasions how much would Mr. Houston drink?

A. Oh, he might have two drinks, three drinks.

Q. Would he on occasion have more than three?

A. Very seldom.

Q. Now, on these occasions, Mr. Masters, of the field trips, do you recall any occasion at all when you were present when he was with field men?

A. Yes.

Q. And when was that, Mr. Masters?

A. We had a so-called field meeting at—it's a term that we use in our business—a field meeting at his cabin up in Oregon.

Q. And when was that?

A. I would say around in April of '53—somewhere in that time.

(Testimony of Richard B. Masters.)

Q. And when you say "a field meeting," this was in a place in Oregon known as what? What was the name of it?

A. Near Lake Field (sic).

Q. Near Lakeview, Oregon. For the purposes of this I will call it Lakeview.

When this meeting was called at Lakeview, who was present as so-called field men?

A. Our sales representatives who are in each state and supervise each state were called in, one or two states were called in for that.

Q. And about how many, about, were present, Mr. Masters?

A. I would say around fifteen to twenty.

Q. And during that time was there any drinking done? [89]

A. Yes.

Q. And during what part of the day?

A. In the evenings.

Q. And lunch time?

A. I don't recall seeing any at lunch.

Q. And what form of intoxicating liquors were consumed?

A. Whisky.

Q. Whisky. And on those occasions did you see Mr. Houston drink?

A. On only one occasion did I see him drink.

Q. And during that time did the other men drink?

A. Yes.

Q. Were the meetings held throughout several days?

A. Yes.

Q. Now, the home office—and when I say "home office" I refer to the New Zealand office at Auck-

(Testimony of Richard B. Masters.)

land—that office, from your own knowledge as manager and formerly assistant manager, were interested, were they not, in the outside activities of its employees?

Mr. Angell: Objected to as incompetent, irrelevant and immaterial and not related to any issue in this case, as to what the home office thought about outside activities. It is no part of this case at all, your Honor.

Mr. Clausen: Your Honor, again I am back to what I stated before, your Honor, that it is just impossible to prove [90] the entire case or any aspect of the case in one question. This, your Honor, is preliminary to other questions of similar character and import, having to do with what I have termed here the reaction of the home office to some of the conduct which had been going on.

Mr. Angell: It is not shown, your Honor, that this witness knows what the home office thought.

Mr. Clausen: I will ask him that question.

Mr. Angell: He is not the home office.

Mr. Clausen: May I withdraw the question, your Honor?

The Court: Yes.

Mr. Clausen: Q. Mr. Masters, from your experience as assistant manager, assistant United States manager, while employed in that position during the time that Mr. Houston was United States manager do you know whether the home office of the firm was interested in the outside activities of its employees? A. I do not know.

(Testimony of Richard B. Masters.)

Q. I beg your pardon? A. I do not know.

Q. Now, Mr. Masters, I will refer you to your deposition, page 45, and ask you whether this refreshes your recollection——

Mr. Angell: Just a moment. May I make an objection?

Mr. Clausen: Page 45, lines 6 to 13.

Mr. Angell: This is the most amazing procedure I have ever seen, your Honor, in some thirty-three years at the bar, [91] counsel taking a witness, making that witness his own, taking the deposition, reducing the testimony to writing, having the deposition in court and then proceeding to ask the questions directly of that witness, that deposition which is unusable, since he brought it here, except for one purpose and that is impeachment and that is by me, and now the counsel is endeavoring to call Mr. Masters as his own witness. Counsel is the one who took that deposition and he produces Mr. Masters here. He is bound by his testimony. Now, he is attempting to impeach him. He has not pleaded surprise in answer to any question and asked relief of this court to be relieved from surprise on any material question in this case, and I submit until he does it is improper direct examination and I object to it.

Mr. Clausen: The pending question, your Honor, before the court is whether the quoted part of the deposition refreshes his recollection. If the witness says no, then I am going to appeal to the court on another ground. I am, your Honor, interested

(Testimony of Richard B. Masters.)

in developing the truth and it would seem to me that the position of Mr. Masters in respect of the manager of the firm, which was formerly occupied by Mr. Houston, is rather self-evident. I am getting the facts and I am getting the facts in the manner that I can.

The Court: The objection will have to be sustained.

Mr. Clausen: Now, your Honor, I claim surprise in that—and I offer to prove that this witness who now occupies the [92] position that Mr. Houston did on this occasion state directly contrary to his present testimony in respect of the question that I ask as to the company practice.

The Court: I am going to allow it, subject to your motion to strike, over your objection, so that you don't waive any of your rights.

Mr. Clausen: Q. I will ask you, Mr. Masters, if you gave this testimony on this occasion—"By Mr. Mannon"—this was not a question put by myself but by Mr. Mannon who represented a different defendant:

"Mr. Mannon: Q. Mr. Masters, did the New Zealand people in Auckland pay any attention to the outside activities of the personnel in the city here?

"A. They were interested in them.

"Q. If Mr. Houston's name had been mentioned or linked with that of a prostitute, would it have affected, possibly, his situation with the company here?

(Testimony of Richard B. Masters.)

“A. I would say that it might have.”

Did you give that testimony in respect to those questions? A. I did.

Mr. Angell: I make my objection and my motion to strike now, your Honor.

The Court: No. We will make up the record.

Mr. Angell: What page, Mr. Reporter?

The Reporter: Designate this as Note 1. [93]

Mr. Angell: Thank you.

Mr. Clausen: Q. Mr. Masters, did you obtain knowledge during the time you were employed by this firm in connection with the accident in which this Cadillac was damaged, that Mr. Houston was driving, with a woman and a man? A. Yes.

Q. And did you obtain knowledge that a settlement was made with this woman by the payment to her of cash? A. Yes.

Q. And did you obtain knowledge, as testified this morning by Mr. Youngers, that after the settlement this same woman made a written demand upon Mr. Houston? A. No.

Q. I beg your pardon?

A. I did not obtain that knowledge.

Q. Mr. Houston never told you anything about that?

A. Mr. Houston never told me anything about it.

Q. Would you cause in that regard a search to be made of the files and employ the assistance of Miss Hoffman, who you said was the secretary, for such a letter, which according to Mr. Youngers

(Testimony of Richard B. Masters.)

came in about a month after the settlement, thirty or forty days I believe he testified.

Do you have, Mr. Masters, in your company files here any copy of the settlement papers made with this woman? A. I don't know. [94]

Q. Will you search for that, and, if found, bring them in the morning also?

A. If they can be found.

Q. I believe reference was made in my questioning earlier this afternoon to another letter which came from the home office to Mr. Houston and which I termed a critical letter—but, in any event, putting that to one side—had to do with a suggestion that Mr. Houston made in respect of appointment or election on the board of directors. Will you tell me, Mr. Masters, the approximate date of that letter?

A. Approximately the end of 1953.

Q. And will you search for that letter and the copy of the reply, if any? A. Yes.

Q. For tomorrow morning.

Now, when Mr. Houston received either one of these two letters, which for my purposes I have called "critical letters file," the one involving the purchase of the automobile or the one involving his suggestion as to the board of directors, did Mr. Houston discuss either one of those with you?

A. Only the second one.

Q. The one involving the purchase of the automobile? A. Yes.

Q. Is that correct? A. Yes. [95]

(Testimony of Richard B. Masters.)

Q. Now, when that occurred did he show the letter to you?

A. No, I don't recall his showing it to me.

Q. Did you observe his demeanor when he spoke with you about it? A. Yes.

Q. Did he appear to you to be upset?

A. Not particularly. A little concerned, I would put the word.

Q. I will refer to your testimony on page 37, lines 13 to 14, Mr. Masters.

Mr. Angell: Same objection, your Honor, as made before.

The Court: Same ruling. I will allow it subject to your motion to strike, over your objection.

Mr. Angell: What page, Mr. Reporter?

The Reporter: This will be designated as Note 2.

(Witness examining deposition.)

Q. (By Mr. Clausen): Page 37, lines 12 to 15:

"Q. Do you know if Mr. Houston answered that letter?

"A. I don't know definitely, no.

"Q. Did he seem upset about it? "A. Yes."

Did you give that testimony? A. Yes.

Q. Now, were the two letters to which I have just referred both signed by this over-all general manager of the world? [96] A. No.

Q. And what letter was not signed by him?

A. The first letter.

Q. And who signed that?

A. I believe it was the then chairman of the board, Mr. Rhodes.

(Testimony of Richard B. Masters.)

Q. Then chairman of the board of the over-all company board of directors? A. Yes.

Q. Was it a practice, Mr. Masters, for your United States operations to be reduced to the form of a report in the early part of each year, which report would be passed through your company auditors and then channeled down to Auckland, New Zealand, to the home office? A. Yes.

Q. And was that report in the process of separation, last year, 1954, at the time of the death of Mr. Houston?

A. It had been completed prior to that time.

Q. And in that report, is it correct that certain revision was made by Mr. Houston? A. Yes.

Q. In some of the figures? A. Yes.

Q. And in that revision, being ordered by Mr. Houston, did it necessitate doing some of the pages over? [97] A. Yes.

Q. And was that in the form of an annual report required by law? A. Yes.

Q. Required by the State of California?

A. By all states.

Q. And this had to do with the amount of business done by the companies, the earnings of commissions and what money would be passed on to the home office and what would be credited here to the United States office? A. That's right.

Q. Now, under the revision that Mr. Houston ordered, the home office would get less money, isn't that correct? A. No.

Q. I beg your pardon?

(Testimony of Richard B. Masters.)

A. They would get more money.

Q. They would get more money, you say?

A. Yes.

Q. Is it not correct that the commissions ordered by Mr. Houston would result in less money for the home office and more money for the United States office?

A. Eventually the home office would make more money out of it. Our profits go to the home office eventually.

Q. Well, is it not correct, Mr. Masters, that some of the figures which required revision had to do with relative [98] commissions paid between two other companies and the New Zealand?

A. That is correct.

Q. And was there not a figure of \$35,000 involved in this revision?

A. I don't recall the figure.

Q. And it had to do, had it not, with the fact that the commissions which had been credited to these two other companies that you referred to this afternoon would not receive this \$35,000 but rather the \$35,000 would be credited to the San Francisco—or, rather, to the United States operations of the New Zealand?

A. That is correct.

Q. And that report was then signed by Mr. Houston?

A. Yes.

Q. And sent in, is that right?

A. Yes.

Q. Now, you stated that you were of the same age as Mr. Houston. How old was he when he passed away?

(Testimony of Richard B. Masters.)

A. I would say 49. I am not sure of that.

Q. And how old were you then?

A. Let's see—that was in '54. I was 48.

Q. 48. The fact of the matter is that you had been employed by the New Zealand then for a period of about two years?

A. About—yes, then about two years. [99]

Q. And when you were employed by the New Zealand it was with the definite idea that you were to take over the job of Mr. Houston, isn't that right?

A. That was never stated at any time.

Q. Would you read your testimony on page 12, please?

Mr. Angell: Same objection, your Honor.

The Court: Same ruling.

Mr. Angell: Call to your Honor's attention too that at the taking of this deposition there were the usual stipulations, that all objections to the answers to any questions were reserved to the time of trial, except as to the form of the question.

The Court: The record shows your objection to this line of testimony. I will allow it to go in subject to the motion to strike.

Mr. Angell: What page, Mr. Reporter?

The Reporter: Note 3.

Q. (By Mr. Clausen): I will ask you to read from the bottom of the page, page 11, because the answer goes over to the top of page 12.

A. (Witness examining.)

Q. Line 23, page 11.

“Q. You spoke of learning the duties of the

(Testimony of Richard B. Masters.)

United States manager right from the start. Did you contemplate from the start that you might be made the United States manager?

"A. Yes, I did. Actually, when I first came with them [100] I did not realize that Mr. Houston and I were so close in age. I was definitely employed with the idea that *same* day I would become the United States manager."

Did you give that testimony?

A. Your Honor——

Mr. Angell: Read all the next three or four questions.

A. Would you read a little further than that?

Mr. Clausen: I will be glad to.

"Q. Mr. Houston told you that, did he?

"A. Never in those words, no.

"Q. That is just because the man who is the assistant manager or deputy usually works up to being manager; is that correct?

"A. Yes. My training was along those lines, in other words.

"Q. Did you anticipate, when you went to work with Mr. Houston, that he would cease to be the United States manager at any particular time? As far as you knew, it might be when he was 65, or some such age?

"A. Yes, I actually felt that we would probably end up about the same, because our ages were very close."

Did you give that testimony? A. I did.

Mr. Clausen: That is all, Mr. Masters. [101]

(Testimony of Richard B. Masters.)

Cross Examination

Q. (By Mr. Angell): The question you were asked before, that was read to you, was when you were told by anyone in the company that you would work up into Mr. Houston's position. My recollection is that you said no.

Mr. Clausen: Object to that, your Honor. Whatever was—well, whatever the other question was would be right there.

The Court: Let the record speak for itself. Proceed.

Q. (By Mr. Angell): That is your recollection of your testimony?

Mr. Clausen: Object to that, on that ground, that the record speaks for itself.

Mr. Angell: It is cross-examination.

The Court: Overruled. He may answer.

A. Are you now asking the question?

Q. (By Mr. Angell): You get the question that I am asking?

A. If you would repeat it again, please.

Mr. Angell: Mr. Reporter, would you read it?

(Pending question read back by reporter.)

A. I was never informed that I would become manager.

Q. (By Mr. Angell): You hoped and felt, like anybody that goes to work, that good fortune smiles on you, if you work hard, you will get to manager, and you were fitted by education and experience for that job, is that correct?

A. That's correct. [102]

(Testimony of Richard B. Masters.)

Mr. Clausen: Just a moment. We will object to that, your Honor, as being compound, calling for the conclusion of the witness, what he felt——

The Court: Let the question and the answer stand. Objection overruled.

Q. (By Mr. Angell): Mr. Masters, as a matter of fact, Mr. Houston very shortly before his death was offered a position as president of the Fire Association of Philadelphia, was he not?

A. He so informed me, yes.

Mr. Clausen: Object to that, your Honor, as being hearsay and certainly not within the scope of the examination that I have conducted of this witness.

Mr. Angell: I am on cross-examination, your Honor, and I am entitled to go into these subjects. You insisted on bringing them in and I am not bound to stay where you opened up these subjects; I can go into them fully, and that is the relationship of this man with his company and his business affairs.

Mr. Clausen: If the court please, what he is doing is asking this witness what some other company may have offered Mr. Houston at the time Mr. Houston died.

The Court: If he knows, he may answer.

Mr. Angell: It shows the state of mind of Mr. Houston, whether it was true or not. [103]

A. Mr. Houston so informed me, yes.

Mr. Clausen: Ask the answer be stricken.

Q. (By Mr. Angell): At that time did Mr.

(Testimony of Richard B. Masters.)

Houston state to you whether he intended to take that job or not?

A. He said he had declined it.

Q. Did he make any comment as to whether he intended to remain with the New Zealand Company?

A. He said he declined because he had promised the board to remain with the New Zealand Insurance Company.

Q. Do you know of any occasion of your own knowledge, from anything you heard or saw, of Mr. Houston ever being asked to leave the New Zealand Insurance Company? A. No.

Q. Was Mr. Houston as far as you know highly regarded by the management of the New Zealand Company?

Mr. Clausen: Object to that as being hearsay and certainly calling for the conclusion of this witness as to what the company may have thought.

The Court: You will have an opportunity to develop the situation if it is otherwise. The objection will be overruled.

A. I have lost track of your question.

Mr. Angell: Strike it.

Q. Mr. Masters, do you have any knowledge by either having anyone in the management of the New Zealand having spoken to you prior to Mr. Houston's death or having seen any correspondence, [104] do you have any knowledge as to whether Mr. Houston was regarded highly and favorably by anyone in the management, the board of directors or any of

(Testimony of Richard B. Masters.)

the officerships of the New Zealand Insurance Company?

Mr. Clausen: To which we make, your Honor, the same objection as before, to the similar question.

The Court: Let the record show the objection will be overruled.

A. I have never heard any comment made which was other than favorable toward Mr. Houston.

Q. (By Mr. Angell): You were asked some questions about Mr. Houston's drinking, on direct, and have you answered substantially all you know or about which you saw as to Mr. Houston's drinking? A. Yes.

Q. And, Mr. Masters, have you ever seen Mr. Houston at any time during your association with him, either socially or in business, where Mr. Houston was intoxicated?

A. "Intoxication" is a relative term. I have never seen him drunk, never seen him to the point where he had lost his ability to handle himself.

Q. Did he always in your presence, or anything that you know of, conduct himself as a gentleman?

A. Yes.

Q. And with proper demeanor?

A. Yes. [105]

Q. Was he highly regarded by his employees who were in and about the place there where you worked?

A. Yes.

Q. Was he on the job regularly?

A. Yes. He was beginning to spend more time at his ranch, with his ranch properties, trying to get a

(Testimony of Richard B. Masters.)

little more rest from his duties. Other than that he was here.

Q. You were asked about this annual report, Mr. Masters. Now, will you just tell the court, simply, what this annual report was?

A. Each year we prepare for the states, for each state, an annual statement. It is made up on a form which has been adopted to make the form adaptable to all states. And we prepare it. It is anticipated and so our accounting department diaries the information and sets it up so that we are ready to have it submitted for printing in sufficient time that it can be signed, reviewed and signed by the chief executive and forwarded to the states. It is a report on our activities throughout the year, the financial aspect.

Q. Is it true or untrue that that report that Mr. Houston got then, and you got up, now is a report required by state law wherever your company does business?

A. That is true.

Q. To be filed annually, and that they require likewise in New Zealand, the head office of the company? [106]

A. Yes, we send it down as a point of information to them.

Q. Now, will you just tell the court how that report is made up. Is that report pretty much—does it pretty much have to comply with a specific form required like, say, to the State of California and the various states for insurance companies to file their statements on?

(Testimony of Richard B. Masters.)

A. Yes, it is a standard form.

Q. It is a standard form. Now, then, that form or statement is in several parts, is it not? A. Yes.

Q. One of the parts is a financial part, is it not?

A. That is true.

Q. As to the financial part, who in New Zealand organization would have been the parties getting up the financial report at the time just prior to Mr. Houston's death?

A. The comptroller and his assistants.

Q. Would Mr. Houston have anything to do with that report, whatsoever, as far as those financial figures were concerned?

A. Very little. They might confer with him on some point or some—. All I am speaking now is from my own personal experience this year.

Q. Now, then, as to the part of the report which Mr. Houston would have had something to do with, what would be that part of the report that Mr. Houston would have to get up as manager?

A. Well, it's very little that he himself would draw up as [107] manager. He would review the whole report. But as manager, there is very little he would have to do with it.

Q. He would review it, to see if it added up and be in correct form, would he not?

A. Not add it up. But if it were in the correct form and—after all, since he has to sign it, he would want to.

Q. He becomes familiar with it.

A. That's correct.

(Testimony of Richard B. Masters.)

Q. Was it possible, as has been inferred here, from the questioning, that in any way Mr. Houston could have jockeyed that report, either to his advantage or against it? A. Well, Mr.—.

Mr. Clausen: Object to that——

Mr. Angell: Just a moment——

Mr. Clausen: ——as calling for the conclusion of the witness. He asked the witness was it possible for something to have been done.

Mr. Angell: Well, rather a nasty inference has been made in this court, your Honor, against Mr. Houston.

Mr. Clausen: Pardon me, Mr. Angell——

Mr. Angell: I am going to erase it, if I can.

Mr. Clausen: I was stating to the court, your Honor, that when he asked the witness if something is possible, clearly calls for the conclusion of the witness, and we object on that ground. [108]

Mr. Angell: I think this witness, if he knows, can answer that question.

The Court: The objection will be overruled. He may answer.

A. Mr. Houston, as the manager for three companies, with sole authority in the United States for them, was in a position to do what he considered was proper in arranging the statement.

Q. (By Mr. Angell): Was that purely as to the physical setup or arrangements?

A. It would be purely the inter-company details, because otherwise it is all set up in form; there is nothing——

(Testimony of Richard B. Masters.)

Q. Now, as to the financial matters, the comptroller, as I understood it, took care of it not only for New Zealand but for the other two, is that correct?

A. Yes.

Q. Mr. Houston was not a comptroller?

A. That is correct.

Q. He was not a financial man?

A. Well, he had an exceptional brain for figures; he could do things with figures or, at least, he could think beyond——

Q. His looking over that report would be to see that it would be in proper shape to be filed as to be required by law, is that true?

A. That's correct.

Q. And do you know of anything in that report that was not [109] in exactly in accordance with law and good practice? A. No.

Q. Did you ever hear within your company or from the state or anybody with which that report was filed that anything was wrong with that report?

A. No.

Q. Did you ever hear Mr. Houston at any time ever say that he was depressed or worried or disturbed about filing that report?

A. The only thing that he said about that report was that it was too bad the comptroller didn't find out this particular matter which he wanted adjusted.

Q. Now, what was this matter that Mr. Houston wanted adjusted?

A. We have three companies, two of which operate through general agents. General agents are paid a

(Testimony of Richard B. Masters.)

higher commission than our local agents. The New Zealand operates through our local agents and a few general agents. The other two companies operate through general agents. The business which the New Zealand Insurance Company reinsures or cedes off to the other two companies was—the commission on that business was paid to the New Zealand on the local agency basis. The business which the other two companies reinsured with the New Zealand, the commission that was deducted was on a general agency basis. Therefore, the other two companies were making about 10 per cent higher, and Mr. Houston simply wanted to equalize this between [110] the companies.

Q. Was that within his power to do, accordingly? A. Absolutely.

Q. That was one of his jobs, to do that, was it not? A. Yes.

Q. He was supposed to do it? A. He was.

Q. And was that accepted so far as you know by both the other companies?

A. There was never any question.

Q. And do you do the same thing now?

A. I would if the occasion arose.

Q. And you have the authority to do it?

A. I have.

Q. And I think you testified that there was never any question concerning that report, no question had ever been raised, either by Mr. Houston or anyone in authority or the company?

A. That is correct.

(Testimony of Richard B. Masters.)

Q. Is it not true that every year that statement, that report, has to be filed, not only by the New Zealand but by all insurance companies?

A. That is true.

Q. Is it not true that for all the years that Mr. Houston was there, that he would have been at least while you were there, [111] that he filed those reports, did he not? A. He did.

Q. Much has been said about this Cadillac automobile accident in Oregon that occurred sometime in November, I believe, 1953, and you testified somewhat on it. I think you testified that you knew very little about it, is that correct? A. That is correct.

Q. And since you heard hearsay or scuttlebutt around the office? A. Yes.

Q. And did you observe at or about the time of that accident in Mr. Houston, that he paid any particular attention or anything unusual or any different from what any other person would do if they had an automobile accident?

A. I didn't observe anything unusual in his behavior—demeanor.

Q. Just comment; it was settled up; as far as you knew that was the end of it?

A. He never mentioned the subject to me.

Mr. Angell: I think that is all.

Redirect Examination

Q. (By Mr. Clausen): Mr. Masters, before you were employed by the New Zealand Insurance Com-

(Testimony of Richard B. Masters.)

pany you had a talk, had you not, with one of the men from the home office? A. Yes. [112]

Q. What was his name?

A. Sir James Gunson.

Q. When you stated, as you stated on page 12, "I was definitely employed with the idea that some day I would become the United States manager," was that impression gained by you after you talked with this Sir James Gunson?

A. Sir James never gave me that statement. I might have the idea as my personal thought, but it was never stated by Sir James at any time.

Q. When you gave your testimony here, on page 12, Mr. Masters, and you stated: "I was definitely employed with the idea that some day I would become the United States manager"—

The Court: There is nothing unusual about that.

Q. (By Mr. Clausen): I say, when you made that statement on your deposition, Mr. Masters, was that impression gained by you after you had talked to this Sir James Gunson?

A. No, it was my idea that I would want to be manager at some time.

Q. And with whom did you discuss your employment, in addition to talking it over with Sir James Gunson? A. And Mr. Houston.

Q. And, let me ask you this, with regard to Mr. Houston and this annual report, you said he stated to you, "It was too bad the comptroller did not find out this allocation was incorrect"?

A. Yes. [113]

(Testimony of Richard B. Masters.)

Q. And as a result of not finding out, was it not correct that the report had to be reprinted and pages pasted over other pages? A. That is correct.

Q. By the way, did you go to Lakeview, Oregon, on more than one occasion? A. Yes.

Q. How often, Mr. Masters?

A. On one other occasion.

Q. When was that?

A. I took my family up for a vacation, at Mr. Houston's invitation.

Q. In other words, Mr. Houston was your host up there?

A. He left the cabin to us; that is, we went up there on our own.

Q. On this occasion, this other time when you were there, was Mr. Houston there? A. No.

Q. Shortly before his death, Mr. Masters, was Mr. Houston complaining about pain or physical infirmity? A. Yes.

Mr. Clausen: That is all.

The Court: Take a recess.

(Short recess taken.)

Mr. Clausen: Lieutenant Sherry, please. [114]

Mr. Angell: I had one question of Mr. Masters. I didn't know they were through with him. He was on the stand.

The Court: You may call him if you wish.

Mr. Angell: He hadn't finished with him. He was on the stand, as far as I was concerned; he was asking him some other questions on redirect.

Mr. Clausen: I was all through, Mr. Angell.

(Testimony of Richard B. Masters.)

Mr. Angell: Then I would like Mr. Masters to come back for just a moment.

Recross Examination

Q. (By Mr. Angell): You were asked on redirect, Mr. Masters, as to whether Mr. Houston happened to state: "It was too bad the comptroller didn't catch the error which had to be corrected and sent back for reprinting." Do you recall what error that was?

A. It was a situation that I mentioned, the commission differential between the companies.

Q. It was something which the comptroller himself should have picked up, is that correct?

A. Yes.

Q. Mr. Houston was kind of complaining that it hadn't been picked up and it had to be reprinted, is that correct? A. That's correct.

Q. I believe you testified on redirect that you had seen Mr. Houston in pain and physical discomfort some time. You [115] didn't fix the time and place, when or what. What did you have reference to? Your answer was "Yes." Will you just explain to the court what you had reference to?

A. Yes. All of that—the week prior to his death he was in pain from his back. He told me that he had lifted a horse trailer over the prior weekend and his back was strained and every time that he stood up or even hardly moved in his chair he would grimace and feel his back. So he said that he was—it was quite painful to him.

(Testimony of Richard B. Masters.)

Q. Did he have a painful back? A. Yes.

Q. When did you last see Mr. Houston alive?

A. On the evening of the Friday prior to Washington's Birthday holiday; about the 20th, I guess it would be, of February.

Q. About how late was that?

A. About five o'clock, just at quitting time.

Q. Where was that? At the office?

A. In our office, yes.

Q. Who was present there at that time?

A. My secretary, Miss Hoffman, and Mr. Houston.

Q. Was Mr. Houston ordinarily a cheerful, happy sort of person, or was he by nature a morose, depressed and meditative sort of person?

Mr. Clausen: Just a minute. We will object to that [116] on the ground it calls for the conclusion of this witness. Counsel himself made objection along that same line to questions that I asked.

The Court: Develop the facts, whatever they be. Reframe your question.

Mr. Angell: I have no objection to making this witness my own witness, for this purpose.

Q. Did you, through the years that you knew Mr. Houston, have opportunity to observe his moods, as to whether he was happy or unhappy by nature?

A. I did have the opportunity.

Q. And did you observe whether he was given to depressions or moodiness?

Mr. Clausen: Object to that—pardon me, your Honor.

(Testimony of Richard B. Masters.)

Mr. Angell: I asked if he observed. It is preliminary.

The Court: You may answer "Yes" or "No."

A. Yes.

Q. (By Mr. Angell): Now, my first question is, describe to the court, as near as you can, Mr. Houston's disposition, as you observed it, with respect to whether he was happy or whether he was a moody person or a depressed person; was he an introvert or extrovert, in your opinion?

Mr. Clausen: Object to that, your Honor, as calling for the opinion and conclusion of the witness.

The Court: It goes to the weight of the testimony. [117] Objection overruled.

A. Mr. Houston was an extrovert. He was probably the least moody person that I know of. He was a very congenial, happy soul.

Q. (By Mr. Angell): Did you observe any difference from the usual pattern or norm of Mr. Houston's behavior on the night of Friday just before the Monday of Mr. Houston's death?

Mr. Clausen: Your Honor, we object on the same ground, and so that I won't be interrupting, may my objection run to this line of testimony?

The Court: Let the record so show. The objection will be overruled.

A. On the Friday Mr. Houston was just a little quieter than he would be in the early part of the week, but anyone, after a week in the office, would be in the same condition, I am sure.

(Testimony of Richard B. Masters.)

Q. (By Mr. Angell): Did you observe, did he appear to be happy?

A. He seemed to be as happy as normal, yes.

Q. Did Mr. Houston ever discuss with you or state anything to you about self-destruction?

A. Never.

Q. Did you have any plans with Mr. Houston or know of any plans of Mr. Houston for the following week after the Fourth of July—pardon me—the Washington Birthday of February [118] 22nd?

A. I don't recall any specific plan.

Q. You know of nothing that was planned by him or he had nothing with you on your calendar, is that right?

A. No, the only thing we were planning together was the attendance at the annual meeting of the Fire Underwriters Association of Philadelphia, which takes place, as I say, annually, and we had planned on that. That would be in the early part of March, just about two or three weeks from then.

Q. You were making plans for that?

A. Yes.

Q. Do you know of any time when the top officers of the New Zealand Company, or any of those other British companies, were over here, did they ever make any trips up to southern Oregon with Mr. Houston, or that ranch, that you know?

A. Yes.

Q. And they knew him well enough to associate with him closely and make trips to the ranch with him, is that right?

A. They did.

(Testimony of Richard B. Masters.)

Q. And go up to Lakeview, Oregon?

A. That's right.

Q. And you yourself went up with your family, did you not? A. That's correct.

Q. Was Mr. Houston ever up there when you were there?

A. Not when my family was there. [119]

Q. Not with your family? A. No, sir.

Mr. Angell: You testified as to the time you were there. Thank you.

Redirect Examination

Q. (By Mr. Clausen): Mr. Masters, in response to counsel's question you say that representatives from the home office made trips to Lakeview, Oregon, with Mr. Houston? A. That's correct.

Q. Who among those home office people did that?

A. Sir James Gunson and Mr. O'Brien, I believe. Both the general manager and a member of the board of directors.

Q. Do you know what these representatives from the home office found out about Mr. Houston's activities up in Lakeview?

A. I haven't the slightest idea.

Mr. Clausen: That's all.

Recross Examination

Q. (By Mr. Angell): Whatever they found, did it seem as far as you observed to disturb their relations with him?

Mr. Clausen: Just a minute. Just a minute——

(Testimony of Richard B. Masters.)

Mr. Angell: You asked this question.

Mr. Clausen: Pardon me—pardon me——

Mr. Angell: I didn't.

Mr. Clausen: Just a moment. Your Honor, we certainly object to that on the ground it calls for the conclusion of the [120] witness. Counsel asks whatever somebody found out did it disturb Mr. Houston.

Mr. Angell: No, I didn't ask whether it disturbed Mr. Houston. I asked whether it disturbed the relationship of these officers of the corporation toward Mr. Houston.

Mr. Clausen: And, your Honor, we respectfully submit that that not only calls for the conclusion of the witness but it is fairly incompetent on other grounds.

The Court: If he knows, he may answer. Objection overruled.

A. Your exact phraseology——

The Court: Reframe the question.

Q. (By Mr. Angell): You were asked the question by Mr. Clausen if they made any observation as to what they found out about Mr. Houston when they went up there with Mr. Houston, which carried the inference with it, I take it, that they found out something that they shouldn't have, and my question is: Did you observe any different attitude of those officers and directors of the company toward Mr. Houston after they came back, regardless of what they found out?

A. For the record, I was not a member of the

(Testimony of Richard B. Masters.)

New Zealand Insurance Company when they went up there.

Q. Oh, so you didn't observe this time when they came back?

A. I don't have the slightest idea what took place, except there was a hunting-fishing trip. [121]

Mr. Angell: Thank you.

(Witness excused.)

Mr. Clausen: Lieutenant Sherry, please.

R. T. SHERRY

a witness called on behalf of the defense; sworn.

The Court: Your full name, please.

A. R. T. Sherry.

The Court: Where do you reside?

A. Berkeley.

The Court: Your address.

A. 1555 Sacramento Street.

The Court: Your business or occupation?

A. Lieutenant of Police.

The Court: How long have you been in the police department?

A. Twenty-five years.

The Court: In Berkeley?

A. Yes, sir.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Clausen): Your present assignment now is what, Lieutenant Sherry?

A. Superintendent of Records.

(Testimony of R. T. Sherry.)

Q. You had that assignment for how long?

A. Intermittently for fifteen years. [122]

Q. During the course of your activities were you asked and subpoenaed since this morning, I believe, to bring to this court the records pertaining to the death of Mr. Houston in February of last year?

A. I was.

Q. And have you those?

A. I do. (Witness producing.)

Mr. Clausen: May the record show, your Honor, that the witness is handing me—I might stand here, your Honor, so that the witness can go over these with me—first, there is a card——

The Court: I suggest you ask the witness what they are.

Mr. Clausen: All right, your Honor.

Q. Just take those and tell me one by one what those items are, that you have in your hand.

A. This printed card is entitled "Casualty Report," is the initial report of any accident which is reported to the police.

Q. Very well.

A. The next, 5x8 manila envelope, contains photographs taken by Officer Wilen concerning this accident.

Q. How many photographs are in there, Lieutenant Sherry?

A. Three different views, with a total of seven copies.

Q. Three different views of what, Lieutenant Sherry?

(Testimony of R. T. Sherry.)

A. One view, the view of the body, viewed from the back; [123] the other view is of the body viewed from an angle in front; the other views show a lever action rifle on a surface.

The next report is signed by Inspector Parker and dated 9:30 A.M., March the 4th, 1954.

Q. Very well.

A. The next report is an investigational report signed by Inspector Parker, February the 23rd, 1954, 9:50 A.M.

The next report is by Officer K. C. Pine, dated March 29th, 1954, 11:30 A.M.

The next is a form report showing the photographer's expenditure of time.

The next report is a printed report titled "Coroner's Register—Inquest"—no date.

The next attachment is a manila envelope containing Coroner's receipt No. 13795, "One body, of William M. Houston," dated February 22nd, 1954.

The next report is the case summary for the Alameda County Coroner, which is signed by Inspector E. F. Parker, February 23rd, 1954, and the time 10:25 A.M.

The next attachment is a 5x8 manila envelope, which is empty. It contained the original notes of Officer K. C. Pine, and a receipt for the rifle. The notation on this rifle indicates that these enclosures were removed November the 7th, 1955, by Officer Pine.

The next report is an investigational report signed

(Testimony of R. T. Sherry.)

by [124] Officer K. C. Pine on February 22nd, 1954, and timed at 4:25 P.M.

Q. Lieutenant Sherry, I will put the rubber band around those—and I will ask, your Honor, that those be marked for identification.

The Court: It may be admitted for purposes of identification.

(Group of police reports, Berkeley Police Department, produced by Lieutenant Sherry, marked for identification Defendant's Exhibit F.)

Mr. Clausen: And I state to Lieutenant Sherry and to the court that I intend to use them (Exhibit F) in the future examination, to which reference was made this morning, when Inspector Pine and Mr. Parker were on the stand and we stated we were going to subpoena these records.

Now, may I ask Lieutenant Sherry if it is satisfactory that these remain in the custody of the Court Clerk pending the trial of this case and to be then returned to Lieutenant Sherry for photostatic copies made and retained by the court?

A. It is. Those, I would like to say—they are the only copy—they are original reports, and while they have been statistically tabulated, we would like to keep track of them.

Mr. Clausen: Yes. Very well. That is all. [125]

Cross Examination

Mr. Angell: Just one or two questions, your Honor.

(Testimony of R. T. Sherry.)

Q. Lieutenant Sherry, you yourself had nothing to do with the investigation of this event, or the death of Mr. Houston, had you?

A. I did not, no, sir.

Q. And your connection with this is as a lieutenant of the police department in charge of the records, is that correct? A. Right.

Q. Was there anything unusual about the handling of these particular records in this case as to your usual practice in the Berkeley Police Department? A. There was.

Q. Will you state to the court what that was?

A. Following a conference with Inspector Parker and the acting chief, myself present, it was decided that the report would be made available to both sides in the event of a controversy.

Q. Was any reason given in that discussion for that?

A. Because we could not come to a positive conclusion as to whether it was—as to what the cause of death was.

Mr. Angell: That is all.

Mr. Clausen: I have no questions, Lieutenant Sherry, at this time. [126]

The Court: Numerically, how many of these reports are there? How many reports are there, so that the Clerk will have it?

Mr. Clausen: Would you count them, Mr. Clerk, please?

The Clerk: Eleven pieces of material, three of which are envelopes.

(Testimony of R. T. Sherry.)

Mr. Clausen: We will call the representative here from the London Guarantee Corporation.

May Lieutenant Sherry be excused, your Honor?

The Court: I have no objection. You may be excused.

Mr. Angell: Oh, yes, as far as we are concerned.

(Witness excused.)

WATSON MANWARING CONNER

a witness called on behalf of the defense; sworn.

The Court: Your full name, please.

A. Watson Manwaring Conner.

The Court: Where do you reside?

A. 131 Almenar Drive, San Rafael.

The Court: Your business or occupation.

A. Regional superintendent, Phoenix of London Group.

The Court: How long have you been so engaged?

A. I have been with them just under ten years.

Direct Examination

Mr. Clausen: Q. Mr. Conner, did you bring here, in response to a subpoena, certain records of the firm by whom [127] you are employed?

A. I did.

Q. And your position with that firm is what?

A. Regional loss superintendent.

Q. And that firm is what firm?

A. It is the Phoenix of London group of companies, London Guarantee and Accident.

Q. And does it do business for and with the

(Testimony of Watson Manwaring Conner.)
New Zealand Insurance Company that is involved in this case?

A. It insured the New Zealand Insurance Company for comprehensive liability coverage.

Q. Was there a loss reported in respect of that policy of insurance? A. Yes.

Q. Covered by that file? A. Yes.

Q. When did that loss occur?

A. October 19th, 1953.

Q. And what is that that you have in your hand, Mr. Connor? A. It is a liability claim file.

Q. Would you just tell me what is in there, the various pages and papers and things?

A. This covers the details in connection with an accident of October 19, 1953, with the New Zealand Insurance Company as the named insured; William A. (sic) Houston is the driver, [128] and Mrs. Vivian Chipman is the claimant.

Q. Mrs. Vivian Chipman? A. Yes.

Q. What are the other papers that you have there in your hands; on the right-hand side there are some papers?

A. Copies of drafts, preliminary action report, releases, one signed statement, and an independent adjuster's report.

Q. And the independent adjuster's name was what? A. J. W. Van Doren.

Q. And made where? Where is his office located?

A. 210 Williams Building, Klamath Falls, Oregon.

(Testimony of Watson Manwaring Conner.)

Q. Is there a release in there signed by Vivian Chipman? A. Yes.

Q. Dated what? A. October 20, 1953.

Q. You said something about a report by this independent adjuster. Which part of the record is that report? A. Right here; the yellow.

Q. The yellow pages. All right. Are these records customarily kept in your files in this form?

A. Yes.

Q. You keep them what, in the ordinary course of business? A. Six years.

Q. Beg your pardon?

A. For six years. [129]

Q. In the ordinary course of business in handling a claim, are they assembled and kept in that fashion? A. Yes.

Q. And were these on this particular occasion so done? A. Yes.

Mr. Clausen: All right. We will relieve you of that, if I may.

I will ask that this be marked for identification, your Honor.

Mr. Angell: May I ask one question? Pardon me. Are you through?

Mr. Clausen: Yes.

Cross Examination

Mr. Angell: Q. Did you have any conversation or discussion with Mr. Houston regarding this claim? A. No, not personally.

Q. Do you know whether Mr. Houston saw the

(Testimony of Watson Manwaring Conner.)

record of the adjustment in this matter, of your own personal knowledge? A. I don't.

(Witness excused.)

(Claim File, produced by witness Conner, marked for identification Defendant's Exhibit G.)

Mr. Clausen: Your Honor, we are going to read into evidence at this point the deposition of Miss Pearson.

Mr. Angell: Are you going to offer—— [130]

Mr. Clausen: This is the deposition of Jean Pearson, taken by the defendants October 26th, 1955, and I am going to read a portion into evidence, your Honor. The preliminary part is to the effect that——

Mr. Angell: Well, just a minute, before you read that into the record. There are certain parts of this that I want to make objection to.

Mr. Clausen: I am going to read it by question and answer so that——

Mr. Angell: Then it is in the record. And I submit, your Honor, that I am entitled to know, in order to make an objection ahead of the record. I don't want to have to go through and strike the whole record. It will keep me busy just trying to keep track of that.

The Court: He is having difficulty keeping up with you.

Mr. Angell: And all that I am asking is that you tell me what parts you propose to read; I will

then be able to make my objections ahead of them being read.

The Court: How many pages are there?

Mr. Clausen: Well, I will tell you what I will do, your Honor. The deposition is very short, only goes on for five or six pages. Why don't I put my son on the stand and I will ask him the questions and he can answer them?

Mr. Angell: You mean, you read the questions, he read the answers? [131]

Mr. Clausen: Yes.

Mr. Angell: I have no objection to that procedure.

The Court: It's about time you put your son to work. Let him take the stand.

Mr. Angell: As the questions are asked, may I request that my objections go in ahead of the answer being read?

The Court: You may.

Mr. Clausen: To my knowledge of what he has in mind, I am going to read slowly so that he can object if he wants.

Mr. Angell: Thank you.

Mr. Clausen: (Reading deposition of Jean Pearson:)

"Be it remembered, that pursuant to stipulation by the counsel for the respective parties, and on October 26th, 1955, closing at the hour of 2:40 P.M. thereof, at the Lake County Courtroom, County Courthouse, Lakeview, Oregon, before me, Dorothy Julier, a notary public in and for the County of Lake, State of Oregon, personally appeared

JEAN PEARSON

called as a witness by the defendant, The Canada Life Assurance Company, who, being by me first duly sworn, was thereupon examined and interrogated as hereinafter set forth.

“Angell & Adams, represented by Forrest E. Cooper, appeared as counsel on behalf of the plaintiff; and Messrs. Keesling & Keesling and Henry C. Clausen, Esquire, and Henry C. Clausen, Jr., Esquire, represented by Henry C. Clausen, Jr., [132] Esquire, appeared as counsel on behalf of the defendant, The Canada Life Assurance Company.

“It is stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

“It is further stipulated that the said deposition shall be reported by Lillian McDonald, an official shorthand reporter, and a disinterested person, and thereafter transcribed by her into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

“It is further stipulated that if this deposition has not been signed by the time of trial, provided the witness has had a reasonable opportunity to read, correct, and sign the same, it may be used by either party at the trial with the same force and effect as if signed by the witness.

“Jean Pearson,
called as a witness by the defendant, The Canada
Life Assurance Company, being duly sworn by the
notary public to tell the truth, the whole truth, and
nothing but the truth, testified as follows:

“Examination by Henry C. Clausen, Jr.:

“Q. Your name is what?

A. Jean Pearson. [133]

Q. Where do you reside?

A. 248 I Street North.

Q. Here in Lakeview? A. Yes.

Q. Were you ever acquainted with one William
Houston? A. I knew him.

Q. Did you ever see him wearing a coonskin
cap? A. Yes.

Q. Now, in the year 1953 in the fall of that
year were you employed? A. Yes.

Q. Where? A. Van's Cafe.

Q. And what kind of establishment is that?

A. It is a restaurant.

Q. And what was your position there?

A. I was head waitress.

Q. What were your hours?

A. Usually from five until one, except in hunt-
ing season, roundup, and we opened up at two. I
worked from two to ten, I think it was.

Q. In the afternoon? A. In the morning.

Q. In the fall of 1953 did you ever have occa-
sion to observe Mr. Houston in Van's Cafe? [134]

A. Yes.

Q. How often was that?

(Deposition of Jean Pearson.)

A. He was in a couple or three times.

Q. And was that in the month of October, 1953?

A. I believe it was.

Q. Did you have occasion to observe his demeanor in the premises there? A. Yes."

Mr. Angell: Just a minute. Your Honor, you will observe that the first time this witness saw Mr. Houston was October, 1953, if your Honor please. May we have the application? I believe that's Defendant's Exhibit A, the application.

The Clerk: Defendant's Exhibit A.

Mr. Angell: The insurance policy. What I want is a copy of the application.

Mr. Clausen: That is attached to the policy, the application, and that is Defendant's Exhibit C.

Mr. Angell: If your Honor will observe, the date on the application, 9-24-53, in the lower or about the center of the right side of that application, the date is 9-24-53. The witness here never, according to her own testimony, never knew Mr. Houston prior to October of '53. The cases are clear that statements made by a witness observing the insured after the date of the application and as to things he did [135] then have no application whatsoever as to misrepresentations in the insurance application. On that ground, we object to any questions touching upon any acts of Mr. Houston after the date of September 24th, 1953, respecting the use of alcohol.

Mr. Clausen: In the first place, this evidence is offered on both defenses, not only the misrepresentation but also, if the court please, the suicide, be-

(Deposition of Jean Pearson.)

cause the evidence here is directly linked, your Honor, to the type of individual, the kind of a man, his habits, what he was doing, and what he was doing especially in this area up there in Oregon.

Now, then, as far as the misrepresentations are concerned, the witness testifies here that in the fall of 1953—she is not confining herself to October—that she did observe Mr. Houston in Van's Cafe and, as a matter of fact, she pinpoints some to October, which is the very month that he took alcohol upon the scene, and therefore on both grounds, on the ground of suicide, on the ground of misrepresentation, the evidence is of course admissible.

The Court: I will allow the testimony to go in on the same ruling, subject to your motion.

Mr. Clausen: (Reading deposition.)

“Q. In the fall of 1953 did you ever have occasion to observe Mr. Houston in Van's Cafe?

A. Yes. [136]

Q. How often was that?

A. Oh, he was in a couple or three times.

Q. And was that in the month of October, 1953?

A. I believe it was.

Q. Did you have occasion to observe his demeanor in the premises there? A. Yes.

Q. Did he appear to have had something of an alcoholic nature to drink? A. Yes.

Q. Would you say that he apparently had a considerable amount to drink on those occasions?

A. Yes.

(Deposition of Jean Pearson.)

Q. Would you say that Mr. Houston was intoxicated? A. Yes.

Q. How did Mr. Houston act on those occasions?

A. He was overbearing and unruly, and he would try to serve himself, just take over.

Q. Did he monopolize the conversations?

A. Oh, Mr. Houston carried on a conversation with everyone when he was drinking.

Q. Would it be correct to say that in a group he acted like a 'big shot'? A. That's right.

Q. Have you ever seen anybody else in Lakeview wearing [137] coonskin caps other than following the Davy Crockett——

A. (Interrupts) No, sir.

Q. Did you observe Mr. Houston in any other place than in Van's Cafe?

A. I have seen him at Hunter's Lodge.

Q. In what condition did he appear then?

A. He appeared to be having a huge time.

Q. Was he drinking? A. Yes.

Q. Did he appear intoxicated?

A. I didn't stay out there long enough. It was early in the evenings.

Q. Who was with him?

A. I don't know. He was with Mr. Utley and their friends from San Francisco and all over Oregon and everywhere."

Mr. Clausen: You can ask the questions—my son the questions, if you want.

The Court: Or you can put one of your able assistants on, if you wish.

(Deposition of Jean Pearson.)

Mr. Clausen: It is your cross-examination. The Court suggested that you put on one of your able assistants.

Mr. Angell: I would just as soon have Mr. Clausen stay there.

I am Mr. Cooper now.

“Mr. Cooper: Q. Are you acquainted [138] with a Mr. H. A. Utley here in Lakeview?”

A. Yes, sir.

Q. How many years have you known him?

A. Oh, personally three years.

Q. About three years? A. Uh-huh.

Q. Also known as and called Harry Utley, is he not? A. Right.

Q. In addition to Van's Cafe, you have also served the public as a waitress at the Hotel Lakeview coffee shop, have you not, since you lived here? A. Yes.

Q. In one establishment or both did you ever have occasion to serve meals to Mr. Harry Utley?

A. I have.

Q. Have you ever had an opportunity to observe the conduct of Mr. Harry Utley at places other than the two restaurants we have mentioned?”

Mr. Clausen: I will object to that, your Honor, as irrelevant. That is a question having to do with another party, this Harry Utley.

Mr. Angell: Association, your Honor.

The Court: Since I have been so liberal with you, I will allow the testimony to go in, subject to the same motion.

(Deposition of Jean Pearson.)

Mr. Angell: All right, your Honor. [139]

The Court: When the record is made up, why, both will be in equal position.

Mr. Angell: All right.

"A. Mr. Utley has always kept himself in place and is a very nice guy."

Mr. Angell: I think you jumped one, line 3, Mr. Clausen.

"Mr. Clausen: I will object to that question as irrelevant."

Mr. Clausen: I just made the objection now.

Mr. Angell: Then "Mr. Cooper"—I think that is what the witness said: "I have." That's the way it looks to me, because I have it as the witness.

Mr. Clausen: It looks that way to me. It looks as though the witness said "I have."

The Court: The young man on the stand can make that determination.

Mr. Clausen, Jr.: I believe that is the witness.

Mr. Angell: (Reading.)

"Q. What was the nature of Mr. Utley's deportment? Do you understand what I mean—what was the nature of his conduct?

A. Mr. Utley has always kept himself in place and is a very nice guy.

Q. You would classify him as a gentleman, would you? [140]

A. That's right.

Q. And did you ever see him and Mr. Houston together? A. Yes.

Q. Isn't it a fact that he was Mr. Houston's

(Deposition of Jean Pearson.)

host; when Mr. Houston came up here to hunt, you knew that, did you not? A. Yes.

Q. They were frequent and constant companions, were they not, during the hunting and fishing seasons? A. Right.

Q. You have never seen Mr. Utley intoxicated, have you? A. No, sir.

Q. You were subpoenaed, were you not, by Mr. Clausen? A. Yes."

Mr. Angell: That's all.

Mr. Clausen: It's five minutes to four. I have a longer deposition. Shall I go on or shall I stop?

The Court: I yield to your wishes. What is your wish in the matter?

Mr. Angell: Our wish is the court's wish.

(Thereupon an adjournment was taken until

10:00 o'clock A.M., November 8th, 1955.) [141]

The Clerk: Houston versus The Canada Life Assurance Company, further trial.

Mr. Clausen: Ready, your Honor.

Mr. Angell: Ready, your Honor.

RICHARD MASTERS

recalled as a witness on behalf of the defense; previously sworn.

Mr. Clausen: Your Honor, there was a letter testified to yesterday by Mr. Youngers, a letter written following the settlement by this woman Vivian Chipman, and I asked Mr. Masters to search for that. This morning counsel, Mr. Angell, tells me that they have located the letter; it is in

(Testimony of Richard Masters.)

the hands of one of their witnesses and that they will produce that letter and the reply by Mr. Houston, so I told Mr. Angell that so far as that is concerned it is satisfactory with me that I put it in or look at it at the time his witness appears.

May I also, your Honor, ask Mr. Angell this: The blackboard diagram here—the diagram on the blackboard—shows a hole cut in the floor and Mr. Angell yesterday stated that of course at the time of the killing the hole was not there, that this was taken out later, so I am asking Mr. Angell now if he will produce whatever was taken out from that floor.

Mr. Angell: When do you wish it produced? We expect to call, your Honor—— [142]

Mr. Clausen: Were you going to——

Mr. Angell: We expect to call Dr. Kirk.

Mr. Clausen: All right.

Mr. Angell: Dr. Kirk removed that and made certain tests on it. We will produce that.

Mr. Clausen: I am satisfied.

Redirect Examination

Mr. Clausen: Q. Now, Mr. Masters, you were asked yesterday morning if you could locate certain documents. Did you make a search, and I see that you have an envelope there on your knee, so I assume you have some material. A. Yes.

Q. Would you tell me what you found, please?

A. I have the rather complete file that I men-

(Testimony of Richard Masters.)

tioned of this cable that was sent to the chairman of the board.

Q. Yes, sir.

A. His reply to Mr. Houston; then a letter which Mr. Houston wrote explaining his action, and then the letter from the acting general manager at the time, Mr. O'Brien, acknowledging his letter, saying that the action was understood and there would be no further question regarding it.

Q. Is that all represented in that group of papers that you have here?

A. Yes. (Producing.)

Q. Thank you. [143] A. Here.

Mr. Clausen: There appears to be quite a series of letters or exchange, your Honor, so I am going to ask this group as a group be marked for identification as the defendant's next in order.

Mr. Angell: No objection. If you wish to offer them, why, we will have no objection to their introduction in evidence.

Mr. Clausen: Q. You have some additional papers, Mr. Masters?

A. I do. The file number 1838 which was mentioned in the correspondence you read yesterday, I have that copy—I don't think it is relevant at all, but I have another letter which is the one to which I was referring, which was shown to me, and incidentally which I had read on December 21, 1953—I had seen it, but it had slipped my memory completely. That is the reference that is made to the accident.

(Testimony of Richard Masters.)

Q. All right.

A. Only that first page is relevant.

Mr. Clausen: The two documents, again, your Honor, they appear to be in scope several pages. I am not going to take the time now to go into them, but I would ask that they be marked for identification as one exhibit, the two separate documents.

Mr. Angell: I notice there are certain markings on this document. What exhibit was that for identification? [144]

The Clerk: This is Exhibit H for identification.

The Court: It will be admitted and marked for purposes of identification.

(Group of documents, letters and cables, marked for identification Defendant's Exhibit H.)

(Group of letters dated December 18, 1953, and January 4, 1954, marked for identification Defendant's Exhibit I.)

Mr. Angell: There are certain marks on here in ink (referring to Defendant's Exhibit I for identification).

Mr. Clausen: Marginal marks?

Mr. Angell: Yes. And the words in ink, "Reins file." (To witness:) Is that the way you would construe it?

A. That means Reins insurance file.

Mr. Angell: Reins insurance file. And then there is an ink line down on the left margin with a sign of some kind; it runs between paragraph 1 and to

(Testimony of Richard Masters.)

the close of 3. Could you state for the record what that mark is and who put it there and why?

A. I just put that on and solely to point out the relevant paragraphs.

Mr. Angell: When did you put that on?

A. Just this morning; just a few minutes ago.

Mr. Angell: Is the same true as to the ink mark?

A. The rest of that is just pertaining to Reins insurance, an entirely separate subject. [145]

Mr. Angell: What were those marks intended to indicate, the part that was pertinent to the inquiry?

A. That's right. The other mark on that second page, I don't know when that was put on.

Mr. Angell: That's the pencil mark with an "X"?

A. Yes. That has no bearing on it. I think that was to indicate——

Mr. Angell: You do not know when it was put there? A. No.

Mr. Angell: Or by whom? A. No.

Mr. Angell: What is your answer?

A. That's right, I do not know.

Mr. Clausen: Q. You have some other papers, Mr. Masters?

A. The only other thing I was requested to bring in, the claim file, on our physical damage loss to the car. The only thing I have is a receipt given by the defense attorneys, Mr. Keesling, for

(Testimony of Richard Masters.)

Kathleen Blanchard, so that file must be in the defense files somewhere.

Q. You are speaking of the collision file?

A. That's right.

Q. That was referred to in the deposition?

A. Yes.

Mr. Clausen: All right. That's all I have, Mr. Masters. Thank you. [146]

Mr. Angell: As I understand it, you have not offered those letters.

Mr. Clausen: No, I am going to read them, counsel, during the recess, to save the court's time, and see if they are pertinent, and introduce them if they are or offer them.

Mr. Angell: Only so that the witness won't have to stay around here, may I look at them?

Mr. Clausen: As far as I am concerned the witness may be excused.

Mr. Angell: Well, I have a few questions.

Mr. Clausen: I mean from the courtroom when you are through.

Mr. Angell: When you offer them in evidence I might want to ask some questions, and I am trying to shorten this up by asking them now so he won't have to come back.

Recross Examination

Mr. Angell: Q. Mr. Masters, did you know whether there was any correspondence or look for any correspondence in the file subsequent to this letter referring to the accident, which is dated the

(Testimony of Richard Masters.)

18th of December, 1953, to see whether there were any letters which was complimented Mr. Houston for the work he was doing for the company?

A. Yes.

Q. And have you those letters here?

A. I believe copies were turned over to [147] you, photostatic copies were turned over to you.

Q. Where are the originals?

A. In our files.

Q. Do you have them here? A. No.

Q. Nor has Miss Hoffman? A. No.

Mr. Angell: Have you any objection to my using the photostats? I will be glad to furnish you copies.

(Discussion between counsel, beyond the hearing of the reporter.)

Mr. Clausen: No, I have no objection, if the witness identifies these, Mr. Angell.

Mr. Angell: Q. I will show you the first letter, which bears a February 5th, 1954, date, purporting to come from the New Zealand Insurance Company, Limited, and ask you if you have ever seen the original of that document. (Handing witness.)

A. Yes.

Q. And is the original in your file?

A. It is.

Q. And is the letter or what purports to be a letter, from the person signing the letter, to the office here in San Francisco, from the New Zealand Insurance Company? A. It is.

Q. And this is a photostatic copy, is that correct? [148] A. That is.

(Testimony of Richard Masters.)

Mr. Angell: I will offer this in evidence as Plaintiff's exhibit next in order.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 2 admitted and filed in evidence.

(Thereupon letter dated February 5, 1954, from New Zealand Insurance Company to San Francisco office, received in evidence and marked Plaintiff's Exhibit 2.)

Mr. Angell: This, your Honor, is dated February 15th, 1954, received at San Francisco, approximately two months after the previous letter offered for identification, as Defendant's Exhibit I for identification, and the letter says—skipping the printed portion:

"I was delighted to hear that your negotiations with Mr. Mylod were brought to a successful conclusion inasmuch as you are to receive 3 per cent of his First Fire Surplus Treaty upon a sliding commission basis. I note too that you will be affording the 'Pacific National' reciprocal business from our own First and Second Surplus Treaties as from 1st July, 1954.

"2. You are to be congratulated on this happy outcome of your negotiations, as I feel quite assured that under Mr. Mylod's careful management the Pacific National Fire Account is well worth while.

"3. As you know, I wrote to Mr. Mylod [149] at your suggestion and received in return a very

(Testimony of Richard Masters.)

pleasant note in which he expressed satisfaction that our two companies are again to be closely associated." Signed—and I can't read the signature.

Q. What is the signature, Mr. Masters?

A. W. J. O'Brien.

W. J. O'Brien, general manager? A. Yes.

Mr. Angell: And this letter, your Honor, is dated just seven days prior to Mr. Houston's death. I notice that this refers to "Subject file" and a file number 1843, 7.1.54. It does not show who this letter is addressed to.

Q. Do you know whether Mr. Houston ever saw it and who that refers to as handling that business (handing witness)?

A. This letter was received by Mr. Houston's secretary in the customary procedure and then would have been sent by him, because it bears his stamp.

Mr. Clausen: We will ask that go out, your Honor, as pure conjecture and speculation, what would have been. The witness is assuming and it is not what would have been but what he knows. He apparently does not know.

The Court: Indicated with the stamp. What about the stamp?

A. There is a stamp "United States Manager." which was customary, when it was read by the manager, he stamps it.

Mr. Clausen: I ask the answer go out, for [150] the reason that I assigned.

The Court: What reason did you assign?

(Testimony of Richard Masters.)

Mr. Clausen: That it is pure conjecture on his part. He was asked the question if he knew whether Mr. Houston saw it; what he is saying is that he assumes Mr. Houston saw it.

The Court: I will sustain the objection. Reframe your question.

Mr. Angell: Q. Was there any mark that persons in the New Zealand office here in San Francisco at that time put on correspondence when they read the correspondence as a matter of office and customary procedure?

A. Yes, it was customary for the United States manager to stamp correspondence when he had read it.

Q. That was part of the——

Mr. Clausen: Pardon me, counsel. May the other answer go out, your Honor, as to which you sustained an objection?

The Court: Yes.

Mr. Clausen: I moved to strike it.

The Court: Yes.

Mr. Angell: Q. Was that the regular, usual and customary procedure in the office at that time?

A. It was.

Q. And does that exhibit that you hold in your hand, Plaintiff's Exhibit 2, bear such a stamp?

A. It does. [151]

Q. And does that stamp indicate or did it at that time that it was put on there that Mr. Houston had read it?

Mr. Clausen: Just a moment. We will object,

(Testimony of Richard Masters.)

your Honor, on the same grounds, there is no proof here that Mr. Houston saw it. The witness does not claim to know. What he is testifying to is the usual practice. We object on that ground.

The Court: You have offered it on the custom?

Mr. Angell: That's right; the usual practice.

The Court: Is that the usual practice?

A. It was the usual practice.

The Court: The record stands. The objection is overruled.

Mr. Angell: Q. Now, the subject matter of the letters refers to your negotiations with Mr. Lloyd Mylod. Could you tell us what those negotiations were, of your own knowledge, if you know of your own knowledge?

A. They were purely reinsurance negotiations between two companies.

Q. Who carried on those negotiations in your office with Mr. Mylod? A. Mr. Houston did.

Q. Thank you. I will show you a letter dated—which purports to be on the letterhead of the New Zealand Insurance Company, dated February 15th, 1954, and it is dated the 5th [152] of February, 1954, and purports to be addressed to the San Francisco office, and ask you if you ever saw the original of that letter. A. Yes.

Q. Where is it? A. It is in our file.

Q. Is that a photostat taken from the file under your direction? A. It is.

Q. And that is a true, correct copy?

A. It is.

(Testimony of Richard Masters.)

Q. I notice, like the previous exhibit, Plaintiff's Exhibit 2, this is addressed to the San Francisco office. That was the customary way of addressing letters, is that correct? A. Yes.

Q. And this purports to be a signature, the general manager, Mr. O'Brien—what did you say his initials are? A. W. J.

Q. W. J. O'Brien. And is that what it purports to be—you know Mr. O'Brien's signature?

A. That is correct.

Mr. Angell: I offer this in evidence as Plaintiff's Exhibit next in order.

(Discussion between counsel outside of hearing of the reporter.) [153]

Mr. Clausen: Is this one of the two that you showed me?

Mr. Angell: Yes.

Mr. Clausen: Well, I have seen it, then.

Mr. Angell: Offer it as Plaintiff's Exhibit 3.

The Court: No objection.

Mr. Clausen: I have no objection.

The Court: Let it be admitted.

The Clerk: Plaintiff's Exhibit 3 admitted and filed into evidence.

(Thereupon letter dated February 5, 1954, received at San Francisco office, from New Zealand Insurance Company, received in evidence and marked Plaintiff's Exhibit 3.)

Mr. Angell: Now, this, your Honor, for the purposes of the record, I would like to read it into the record. It is dated the 5th day of February,

(Testimony of Richard Masters.)

1954, and from New Zealand, and received and marked on the letter—received in the San Francisco office on February 15th, 1954—again, just seven days prior to Mr. Houston's death. Skipping the subject matter at the top, which has nothing to do with it, or I think it should be in the record—"Subject: Boston Insurance Company Inward USA Fire Treaty.

USA Outward First Surplus Fire Treaty

USA Outward Second Surplus Fire Treaty."

And then on extreme right-hand corner, "Subject file."

"I was interested to hear that following your visit to [154] Philadelphia, during the course of your recent eastern trip, you had secured a 3 per cent participation in the First Surplus Fire Pool of the Boston Insurance Company, and that you will have to provide reciprocity from our own First and Second Surplus Treaties to the extent of 10 per cent, which from the computation you have given in regard to the 'Pacific National' income would seem to be somewhat more than will be required to balance the accounts. I would have thought 7½ per cent of our Treaties would have been more appropriate.

"2. I raise the matter not in any carping spirit as indeed I share your own satisfaction that we are to participate in the First Surplus Treaty of such a splendid Company as the Boston, but from the point of view of the sharing of our own First and Second Surplus Fire Treaties, I am somewhat con-

(Testimony of Richard Masters.)

cerned as you suggested redistribution as far as affects the Fireman's Fund Office.

"3. I will deal further with the subject in my reply to your letter 1845 in regard to the Employers' Fire Insurance Company Treaty. By the way, I assume you will have to pay Messrs. Balis & Company commission as Brokers for introducing the business.

"4. I would like to offer you my congratulations in regard to your successful efforts in having the Treaty business of both the Pacific National and Boston Companies included in your 1953 Underwriting Accounts." [155]

I think that is all. Beg your pardon, Judge. I want to ask a question.

Q. Does that letter, Plaintiff's Exhibit 3, bear any indication or any mark that Mr. Houston had read that letter?

A. It bears the stamp of the United States manager, February 15th, 1954.

Q. And your testimony in regard to that stamp would be the same as to Plaintiff's Exhibit 3, the letter that you are holding, as it was to Plaintiff's Exhibit 2, with regard to these markings?

A. Right.

Mr. Angell: No further questions.

Mr. Clausen: Of course, my objection, your Honor, is the same to this as it was to the other, and as to which I assume your Honor would make the same ruling.

The Court: The objection will be overruled.

(Testimony of Richard Masters.)

Mr. Clausen: I have no questions. So far as I am concerned Mr. Masters may be excused, your Honor.

The Court: May he be excused?

Mr. Angell: At this time. I might want to recall him.

The Witness: Would I be permitted to correct a statement made yesterday?

The Court: Certainly.

The Witness: I want to correct a statement made yesterday because the answer is so obvious. I intended to add [156] one sentence to my statement and then we were interrupted by discussion between counsel and I didn't have the opportunity. You asked me whether our head office——

Mr. Clausen: When you say "You"—for the record, you mean——

A. Counsel, defendant's——

Mr. Clausen: Myself?

The Witness: Defendant's.

Mr. Clausen: Clausen is my name.

The Witness: Clausen. Thank you. Mr. Clausen asked me if our head office would be interested or our officials would be interested in the personal lives of their people over here in the United States.

Mr. Clausen: Yes.

The Witness: And you asked me—or Mr. Clausen did: Do you know that that is the case? My answer was: No. And what I wanted to add was: I do not know that is the fact, but I assume, it

(Testimony of Richard Masters.)

being common business practice, that they would be rather interested in the business lives—the personal lives of their people here.

Mr. Clausen: Yes.

The Witness: That was all I wish to add for the record.

The Court: All right, you may be excused.

(Witness excused.)

Mr. Clausen: We offer in evidence, from the file which [157] is marked Defendant's G, the report of the insurance adjuster which was referred to yesterday, dated October 22nd, 1953, marked J. W. Van Doren, Insurance Adjuster at Klamath Falls, Oregon: "Personal and confidential" to "London Guarantee and Accident Company, Ltd."

Mr. Angell: May I see that?

The Court: Show it to counsel.

Mr. Clausen: The foundation for this was laid yesterday afternoon, if the court please, and the testimony of Mr. Manwaring Conner——

Mr. Angell: Pardon me. But are you offering this lengthy file in a bundle?

Mr. Clausen: I am only offering the adjuster's report.

Mr. Angell: Just the report?

Mr. Clausen: The report of the adjuster.

Mr. Angell: Just the report?

Mr. Clausen: Yes.

Mr. Angell: I hold in my hand an exhibit which is marked with the Clerk's stamp "Defendant's Exhibit G."

Mr. Clausen: Exhibit G.

Mr. Angell: I think this was for identification. Was it not?

Mr. Clausen: That's right.

Mr. Angell: It says for identification. Now, what I am asking is, are you offering just the adjuster's report? [158]

Mr. Clausen: That is all I am offering.

Mr. Angell: In other words, Mr. Van Doren's report, or are you offering the entire file?

Mr. Clausen: I have said several times, I am offering the report of the adjuster.

Mr. Angell: Then I will request that the report be taken out of the file, your Honor, and treated as a separate record so that I may direct my objection to that one document and not to a stack of documents.

The Court: Now, in relation to this method of proceeding, I think that the usual practice is to offer any of those articles in evidence.

Mr. Clausen: You mean the whole file?

The Court: No, not the whole file. You can put the file in for purposes of identification but not stop there. What is the purpose of offering it?

Mr. Clausen: I am merely offering the report of the adjuster. However, I am perfectly willing to offer the whole file, your Honor. I offer it. I will do that, offer the whole file, surely. It's all banded together too, Judge—I mean your Honor. You see, it is stapled together. I would just as soon offer the whole file.

The Court: Well, now, you mustn't stop there.

That file doesn't mean anything to me unless it is developed whether or not it will go in evidence.

Mr. Clausen: Oh, well, your Honor——

The Court: Give counsel an opportunity to object. He may not object.

Mr. Angell: I can make my objection right now, your Honor, the formal objection to encumbering the record with immaterial and inadmissible evidence, because it just takes time to get it out of the record. I am going to make my formal objection. You will recall, your Honor, that I asked the witness on the stand yesterday if he personally had compiled this file, if he knew anything about it. He said no. I asked him if Mr. Houston had ever discussed this matter with him, and he said no. I asked him: Did Mr. Houston ever see this file? He said no. I therefore think that the answer is clear, that the file is not admissible, because it is not shown that Mr. Houston ever saw it. There are notes of the adjuster, a report of the accident; whatever statements are in there are wholly hearsay to Mr. Houston. They are by the insurance carrier adjuster who was adjusting this loss, and to have us swallow this whole file, the personal notes of the adjuster taken up there at Lakeview at the time of the accident, I think is——

The Court: You indicated at the very outset that you had no objection to it going in.

Mr. Angell: I didn't mean to. If I did so indicate——

Mr. Clausen: In answer to that, your Honor——

Mr. Angell: Pardon me, Mr. Clausen. I think

you Honor refers—I have no objection except the formal objection that they are not admissible because they have not been in any way connected with Mr. Houston or have shown to have been within his knowledge. There are two issues in this case; one, that Mr. Houston died accidentally or by his own hand; two, was Mr. Houston's statement in his application that he drank occasionally and was a social drinker and didn't use alcohol to excess, were they false representations so as to affect the validity of the insurance that the defendant is here trying to avoid. Now, I say that these notes on the accident by an adjuster employed by a company—he was not employed by Mr. Houston. Mr. Houston didn't make the notes; there is no evidence he ever saw the notes, so he couldn't obviously have had these notes in mind at the date of his death so that they could in any way have affected his mental thought toward this accident. And as to drinking, there is nothing shown in here that Mr. Houston knew what was said here so that he would have any attempt to refute it.

That's the only basis of my objection and it is a formal one. Other than that, why, I said I had no objection. Well, maybe that's like stating a three-page objection, you Honor, and then saying, your Honor, well, I don't stand on it anyway. But I do stand on it strictly, and to avoid encumbering the record. [161]

Mr. Clausen: Now, in answer to that, your Honor, may I recall to the court the testimony of Mr. Youngers. First, we had the testimony of Mr.

Youngers that there was a report from Mr. Houston himself; following which Mr. Youngers, at the request of Mr. Houston, took the action which, your Honor, resulted in the employment of this very insurance adjuster, J. W. Van Doren, and that was further elaborated on by Mr. Youngers in his deposition which we have right here on file. So, if the court please, this action is the action taken by Mr. Youngers, the employee of Mr. Houston, at the request of Mr. Houston. Then, your Honor, when Mr. Youngers was here on the stand yesterday I developed the fact that this was done. I then asked Mr. Youngers did he have the papers. He said no. And so then I subpoenaed from the man, Mr. Conner, who brought them, and Mr. Conner, your Honor, laid the foundation that these were the records and that they were kept in the ordinary course of business and that they referred to this particular matter. This is the matter that we have had considerable testimony on concerning the episode in this Cadillac.

The Court: Well, in order to have a proper record, you will have to take every one of those documents separately and offer them.

Mr. Clausen: All right, your Honor.

The Court: So as to give him an opportunity to object.

Mr. Clausen: I offer, then, to start with, the report [162] of J. W. Van Doren, the insurance adjuster, dated October 22, 1953. They comprise this yellow report here in the file, your Honor.

Mr. Angell: Same objection as made before, in-

competent, irrelevant, immaterial, not within any issue of the case, strictly hearsay as to Mr. Houston or any plaintiff in this action, and that they are self-serving declarations by someone not connected in any way with Mr. Houston.

The Court: Note the objection. The objection will be overruled, subject to a motion to strike.

Mr. Angell: I request that these exhibits be read in evidence, your Honor, as the exhibits are when and if given.

Mr. Clausen: I have no objection. This, your Honor, is marked "Personal and confidential." It is addressed to the London Guarantee and Accident Company, Ltd., 360 Pine Street, San Francisco 4, California. I will leave out the numbers and policy numbers, and so forth:

"Gentlemen: This will confirm telephone assignment on this case from Mr. Paul Youngers of New Zealand Insurance Company, and furnish report of my activities in accordance with this assignment.

"Mr. Youngers was unable to make contact with me until approximately five P.M. on October 20th. I was asked to immediately make a trip to Lakeview to contact Mr. William M. Houston, United States Manager for New Zealand Insurance Company, [163] who was in Lakeview, and had been involved in an accident while driving a Cadillac sedan owned by New Zealand Insurance Company. I was able to make telephone contact immediately with Mr. Houston and arranged to meet him at Hunter's Motel in Lakeview at 10:30 p.m. that night.

“This accident occurred sometime after midnight in the early morning hours of October 19, 1953. The definite time was not established, although it was probably between 1:30 and 2 A.M. Mr. Houston had been in Lakeview for some time staying at one of his ranches, and he had invited Mr. Alton F. Irby, Jr., of A. F. Irby & Company, 40 Pryor Street, S.W., Atlanta, Georgia, to visit him and enjoy some bird hunting. Mr. Houston and Mr. Irby had come into the bar of the Hunter’s Motel at approximately 11:30 P.M. on Sunday night, October 18th, where they met, allegedly for the first time, Vivian P. Chipman. They became acquainted and had one drink at this bar. The bar closes at twelve, and apparently this association of the three people proved to be mutually congenial and stimulated the mutual desire on the part of all three for further comradeship and association. It was then decided that the three of them would drive to Alturas, California, which is approximately 56 miles from Lakeview, where they could attend a dance and would find bars open until 2:00 A.M. The three of them then started out in the Cadillac sedan for Alturas, and after traveling about 45 miles and getting to a point [164] within 11 miles north of Alturas, they met with an accident.

“This accident occurred in an area known as Chimney Rocks, and at a point where a new highway is being constructed, and apparently the accident took place right at the junction of the new highway with the old highway. The section of new highway at this point is not completed and is bar-

ricaded off. The new highway is on a graded roadbed higher than the old highway. Mr. Houston, who admits he was traveling 60 to 65 miles an hour, was confronted with several deer crossing the highway directly in front of him. He tried to avoid hitting the deer by swerving to his left and trying to get onto the new highway roadbed. He hit the flimsy barricade and apparently swerved out of control, going into the area between the new roadbed and the old highway. This was an uneven surface, and the car jostled and tipped back and forth for some distance before coming to a stop.

“Mr. Houston feels sure that the car did not overturn, but that it was tipping badly from side to side.

“Apparently Mr. Houston was thrown from the car, but it is my understanding Mr. Irby and Vivian Chipman rode with the car until it stopped. After it stopped Mrs. Chipman was lying on the floorboards under the dash.

“They apparently remained at the scene of the accident until an approaching car stopped, which picked the three of them up and returned them to Lakeview. After arriving in [165] Lakeview, Mr. Houston arranged for Gordon Long, automobile repairman, to have the car picked up at the scene of the accident and brought back to Lakeview. This was done through the tow truck service furnished by Glos Motor Company, who are Oldsmobile-Cadillac dealers in Lakeview, but who do not have any automobile repair shop.

“We have a situation here of two prominent busi-

nessmen being involved in an accident causing injuries to a very attractive young lady, of rather doubtful character and background, under circumstances not entirely complimentary to Mr. Houston and Mr. Irby. There was the background of drinking and some possibility of successful prosecution of just claim against Mr. Houston and the New Zealand Insurance Company.

“Vivian P. Chapman is 26 years of age, resides at 8635 Trojan Street, Novarro, California. She claims to be a divorcee, having secured a divorce approximately six months ago from Dale Chipman in Los Angeles. She has one child, a daughter, who will be seven years of age October 23rd. Mrs. Chipman claims to be a bar girl, and formerly worked for Pig’n Whistle in Los Angeles, and that she averaged \$150.00 a week, including her salary and tips.

“She was taken to W. P. Wilbur, M.D., for examination. X-rays were taken of her chest and it was determined by Dr. Wilbur that she was suffering a separation of the sternum, and she had a hematoma on the low back region just above the left [166] hip. She was somewhat dazed and confused from the impact of the accident, although I don’t believe there was history of unconsciousness to indicate concussion of any degree. The doctor wanted to hospitalize her at the Lakeview Hospital, but she refused to submit to this treatment, feeling she would be better off in a motel room at Hunter’s Motel. Mr. Houston and Mr. Irby were very solicitous for her welfare and did everything possible to

provide for her comfort, probably going somewhat beyond the bounds of ordinary care and attention that one generally finds in a situation following an accident.

“There is some element of mystery as to why this woman, with her very obvious background, would be in an isolated rural community such as Lakeview. She claims to have been in the area for approximately a month, and on the expressed reason of being there for rest and solitude, which of course she could find in abundance in that area. It was claimed by all three persons that the meeting at the bar at Hunter’s Motel just prior to the accident was the first time these three people had become acquainted.

“There is every indication that this was the type of case that immediate settlement should be attempted before this claimant got back to her home environment and under the more direct influence of her well-wishers and friends. This situation was recognized by Mr. Houston and Mr. Irby and they had set the stage for this treatment of the case. Apparently Mrs. [167] Chipman’s mother had been to Lakeview, expecting to pick up Mrs. Chipman and drive her back to Los Angeles, but the doctor advised against such a long automobile trip, and so the mother had left without the daughter. I didn’t meet the woman, but it was reported that she was rather domineering, and obviously very anxious to get the daughter back under her control, and into the hands of some attorney so that the case would be prosecuted to the fullest extent.

“Some Jewish boy friend in Oakland had called Mrs. Chipman long distance and given her explicit instructions that she was not to sign any papers of any kind, and to leave her case open until she got back to Oakland. She apparently had arrangements made with this individual to stay at his home after she got into Oakland on her return from Lakeview. It is reported that this individual’s name was Izzy Cantrovich. I am satisfied that this situation existed because Mrs. Chipman confided in me after the settlement was *completely* that this man had called her and told her these things, and that also one or two girl friends had called her up to congratulate her on the fine position she had attained, and to speculate with her as to how much money she could collect.

“Mr. Houston had expected that I would arrive with a large amount of cash so that a settlement could be consummated immediately, and a tender of actual cash made rather than a draft or a promise of a settlement draft. I was not prepared [168] to handle the case in this manner. Mr. Houston then got busy and wrote personal checks securing all the available cash he could dig up in Lakeview at that hour of the night. He finally came up with \$800 in currency.

“After being armed with this currency, the writer and Mr. Houston then called on Mrs. Chipman where she was confined to her room. This was approximately 11:30 P.M. It was my impression after visiting with the woman for a few minutes that she was somewhat overawed, confused and apprehen-

sive. I felt under the circumstances a soft approach would be more effective, and every attempt was made to visit with her and gain her confidence. Mr. Houston felt it would take \$1200 to settle the claim, based on the fact that the doctor had told her she couldn't work for two months, and he had computed eight weeks' loss of wages at \$150 a week to arrive at this \$1200 figure. I gained the impression that he perhaps had, through his previous contacts with the lady, intimated in some way that she would receive that amount of money in settlement, exclusive of her hospital expense. I secured the attached signed statement from her before talking settlement. After some discussion we were able to secure her signature to the attached release for \$1,050. This is based on \$1,000 to cover loss of wages, plus \$50 for the transportation expense to get back to Los Angeles.

"I turned over the \$800 in currency, and I gave her my personal check for \$250. I corrected the release form to [169] indicate that the consideration was in cash and check.

"I read the release form aloud to her, and very forcefully and explicitly informed her that in signing it she was releasing all right to bring any further claim against Mr. Houston or the New Zealand Insurance Company, and I feel there can be no doubt in her mind but what she had signed a full and final release. She has written at the bottom of the release form the fact that she has read this release of all claims.

"We brought in Mr. Ed Hill, proprietor of

Hunter's Motel, to witness her signature, and I have acknowledged it as a notary public.

"We have a rather complex situation here in that the statement secured from Mrs. Chipman completely exonerates Mr. Houston, and would seem to indicate there is no basis for substantiating any claim under the death law for California.

"Mrs. Chipman's attitude at the time of our contact was one of complete understanding and cooperation. She expressed many times she had no desire or intention of making any trouble for Mr. Houston. On the other hand, we had a young lady whose whole background and appearance suggested a person of loose morals, and whose attitude toward employment and the opposite sex was most definitely unconventional. The contacts from her circle of friends and natural environment indicated that after she returned to her home she would be subject to unusual pressure to attempt to capitalize on this accident. This lady is somewhat [170] childlike in her mental processes, and degree of intelligence, and there is a very good chance that her attitude could be changed by this influence and pressure from her wellwisher friends. We felt that in view of all these circumstances involved that it would be better to have a release executed by her immediately.

"There will be a guest medical claim to be presented later as soon as the medical bills can be accumulated. We requested the medical report and billing from Dr. Wilbur, and Mrs. Chipman has been instructed to notify us if she seeks additional

medical attention. She undoubtedly will consult another doctor after returning to Oakland or Los Angeles. She is at present wearing a heavy cloth support around her chest, and is complaining and discomfort in her low back region.

"I brought her in my car back to Klamath Falls and arranged here for her to get reservations on the 6 p.m. flight on United Airlines to Oakland. She left here on October 21st. My personal check was cashed for her in Klamath Falls.

"Mr. Houston and Mr. Irby are returning to San Francisco on October 23, and at the time they will contact your office through Mr. Paul Youngers, and arrange to give their statements on the accident.

"I personally checked the involved vehicle at Glos Motor Company in Lakeview and find it to be a 1951 grey colored Cadillac 4-door sedan, carrying motor No. 61-60-75329, California [171] license No. 2B32406, and showing speedometer reading of 46,522 miles. This vehicle shows considerable damage to the turret top. It is quite badly kinked and dented, and it would appear to me that in all probability the car upset.

"Mr. Houston suffered bruises and hematomas on his legs and back, and secured medical attention from Dr. Wilbur. I solicited medical reports from Dr. Wilbur, and the amount of his treatment for Mr. Houston, and these papers will be sent on to you so that any claim Mr. Houston has under guest medical coverage can be consummated.

"As soon as my personal check clears the bank I can send it to you for the completion of your

file. In the meantime it would be very helpful to me if I could be reimbursed as quickly as possible for the expenditure of this money. It is my understanding, Mr. Houston through Mr. Youngers, will arrange with your office for reimbursement of the money he accumulated by issuance of his own personal checks to provide the currency for the settlement in the sum of \$800.

“There will be little further work that I can do in the handling of this matter. As soon as I receive the medical reports and bills from Dr. Wilbur I will send them on, and this would seem to be the extent of my further activity on the case. I am therefore submitting at this time my service bill for your consideration. Signed J. W. Van Doren”.

The Court: I should like to ask you, for the purpose of the record, to indicate the purpose of this offer.

Mr. Clausen: It is, Your Honor, in connection with the testimony by Mr. Youngers, the testimony by the additional witness Miss Wilkerson that will be offered in the deposition that I am going to offer following the completion of this offer here.

The Court: I don't follow you clearly. I don't follow you.

Mr. Clausen: It indicates, Your Honor—the offer is made also preliminary to the receipt of the further letter from the same Chipman person that Mr. Angell stated this morning would be produced through this attorney. The additional letter, Your Honor, showed—rather, the additional testimony of Mr. Youngers was to the effect that following the

accident a claim or demand letter was made by this party Chipman, which letter I have not seen, Your Honor, so this, Your Honor——

Mr. Angell: For the record, I object to the statement of counsel. It is a misstatement of any testimony of any witness in this case, and there is no testimony of any witness in this case that there was any further demand made on Mrs. Chipman's part.

Mr. Clausen: It is my recollection yesterday that Mr. Youngers—Your Honor is asking me the purpose of the offer, and the purpose of the offer, Your Honor, is to connect [173] the chain. Mr. Youngers yesterday, according to my recollection, testified that some 30, 40 days after the accident that this woman wrote a letter into Mr. Houston and that Mr. Houston showed it to Mr. Youngers and that Mr. Youngers suggested that this be turned over to some other person.

The Court: Well, so that no one is misled in this case, I will entertain a motion to strike this document from the record.

Mr. Angell: I make it at this time, and move to strike. From the record on the ground it is incompetent, irrelevant, immaterial, that it does not bear upon any issue in this case, that it is hearsay as to Mr. Houston and the plaintiff in this case, and the statements in there are wholly self-serving declarations and not binding in any way upon the plaintiff or upon Mr. Houston and it is not shown—it is positively to the contrary that Mr. Houston did not see this report or did he ever have any

conversation with any one about the report after the things was or at the time of being prepared.

Mr. Clausen: In answer to that, Your Honor, since Your Honor has invited the motion, I would anticipate the granting of the motion, but——

The Court: I purposely granted it so that you are not mislead.

Mr. Clausen: May I, Your Honor, renew my offer then when the letter is produced by Mr. Angell that Mrs. Chipman—— [174]

The Court: I don't follow you.

Mr. Clausen: I wish to adhere to the Court's ruling, if the court should grant this motion.

The Court: I purposely granted it.

Mr. Clausen: All right, your Honor. Then I will renew the offer when the letter is produced that Mr. Angell has.

The Court: Very well.

Mr. Clausen: At this time, your Honor, we offer in evidence the deposition to which I have just referred now of Wilkerson and may I follow the same form, your Honor—rather I will follow the same form that your Honor observed, yesterday of putting my son on the stand to read the answers and I will read the questions.

The Court: Very well. We will take a recess now.

(Recess taken.)

Mr. Angell: If your Honor, please, there is sitting at the counsel table here, the young lady on my right here, is my daughter, Miss Tommy Angell. She is a member of this Bar and she is with us. I just want the record to show that.

Mr. Clausen: Your Honor, this is the deposition of Virginia Wilkerson, taken on October 26, 1955, and I will omit the title of the case and so forth, and it starts in:

VIRGINIA WILKERSON

"Be it remembered that pursuant to stipulation by the counsel for the respective parties, and on October 26, 1955, closing at the hour of 2:00 p.m. thereof at the Lake County [175] Courtroom, County Courthouse, Lakeview, Oregon, before me, Dorothy Julier, a notary public in and for the County of Lake, State of Oregon, personally appeared Virginia Wilkerson called as a witness by the Defendant, the Canada Life Assurance Company, who, being by me first duly sworn, was thereupon examined and interrogated as hereinafter set forth."

The same appearances, same stipulations as on the deposition I read yesterday of June Pearson, and, with the court's permission, I will omit them here.

"Examination by Henry C. Clausen, Jr.

"Q. Your name is what?

"A. Virginia Wilkerson.

"Q. And where do you reside?

"A. In Lakeview.

"Q. Were you acquainted with one William Houston? "A. Yes.

"Q. How long had you known him?

"A. About 10 years.

"Q. Where did you first meet him?

"A. At my father's home in Lakeview.

(Deposition of Virginia Wilkerson.)

"Q. Would you describe yourself as a close friend of Mr. Houston's? "A. Yes.

"Q. You are aware of the suit now pending in which you [176] are giving testimony, in which Mrs. Charlotte Houston is suing the Canada Life Assurance Company, the Assurance Company raising the defense of suicide—one of the defenses. Do you consider yourself hostile to that defense?

"A. Yes.

"Q. How often would you see Mr. Houston over this period of 10 years?

"A. Probably four or five times a year.

"Q. Would that be in the spring and fall, or when, approximately?

"A. Oh, in the spring and in the fall, sometimes in the summer.

"Q. Was Mr. Houston ever a house guest of you and your husband? "A. Yes.

"Q. How often?

"A. Every time he came down.

"Q. Would Mr. Houston come alone?

"A. No.

"Q. Was he always accompanied by Mrs. Houston? "A. No.

"Q. In other words, he would sometimes come up alone and sometimes bring Mrs. Houston with him, is that correct? [177]

"A. Correct.

"Q. Have you ever visited Mr. Houston in San Francisco or Berkeley? "A. No.

"Q. You were never in San Francisco?

(Deposition of Virginia Wilkerson.)

"A. I have never been to his home. I have been to his office, but never to his home.

"Q. On these occasions when Mr. Houston was present here in Lakeview at your home, would you have anything of an alcoholic nature to drink?

"A. Yes.

"Q. And when during the day would he begin to have these drinks? "A. No set time.

"Q. Would they sometimes begin in the morning?

"A. I have seen him have a drink in the morning.

"Q. And would he on those occasions continue drinking throughout the day?

"A. I would say yes.

"Q. Did Mr. Houston have a nickname?

"A. Yes.

"Q. What was the nickname?

"A. 'Wild Bill.'

"Q. Wasn't there a suffix on that?

"A. You mean the 'Hiccup?' [178]

"Q. 'Wild Bill Hiccup' was his nickname, is that correct? "A. Yes.

"Q. Did Mr. Houston drink more when he was up here along than when he was here with his wife?

"A. I don't know.

"Q. When Mrs. Houston accompanied him to Lakeview, did they both stay at your house?

"A. No.

"Q. They did not? "A. No.

"Q. Would you describe Mr. Houston as a hypochondriac?

(Deposition of Virginia Wilkerson.)

"A. He took a lot of pills.

"Q. And was he constantly urging other people to do the same?

"A. He always had a cure for everything.

"Q. What was his cure for ulcers?

"A. I don't know—little pills.

"Q. What did Mr. Houston drink normally when he was up here? "A. Scotch.

"Q. And did he use any mix of any kind?

"A. Water, I believe.

"Q. Did he ever mix Scotch with milk? [179]

"A. Yes.

"Q. Did he tell you why he did drink such a drink?" "A. Joking, yes.

"Q. What did he say?

"A. 'The Scotch is for me, and the milk is for my ulcer'.

"Q. Would you describe Mr. Houston as being extremely egotistical?

"A. Not extremely.

"Q. You would describe him as being egotistical? "A. Yes.

"Q. Would he monopolize conversations?

"A. Yes.

Q. Would he become more egotistical and monopolize conversations more after he had drinks of alcohol? "A. No.

"Q. Did Mr. Houston ever shoot the ear off a stuffed deer in your father's office?

"A. I don't know whether it was its ear or not, but he did fire a gun once in his office.

(Deposition of Virginia Wilkerson.)

“Q. And had he had anything to drink on that occasion?
“A. I don’t know.

“Mr. Cooper: Were you present?

“A. Yes.

“Mr. Clausen: You don’t know? [180]

“A. No.

“Q. You were present when Mr. and Mrs. Houston were here together, were you not?

“A. Yes.

“Q. And on those occasions did you observe a change in Mr. Houston’s demeanor than when he was here by himself?

“A. Yes—a lot quieter.

“Q. And on those occasions when they both were up here, did Mr. Houston have as much to drink as when he was up here alone?
“A. No.

“Q. How many drinks did he normally have when Mrs. Houston was there?

“A. I wouldn’t know.

“Q. You don’t know, did you say?

“A. (Nods head)

“Q. Did you ever see him have anything to drink when Mrs. Houston was here?

“A. Yes.

“Q. And when was that, by the way? When was it that you saw him have drinks with Mrs. Houston?

“A. Whenever we went over to their cabin to visit them, he would offer us a drink.

“Q. In other words, it was on a number of occasions? [181]
“A. Yes.

(Deposition of Virginia Wilkerson.)

"Q. On those occasions how much did Mr. Houston have to drink?

"A. Oh, several cocktails.

"Q. When he was up here by himself on the occasions when you saw him drinking, how much did he have to drink then, as a general rule?

"A. That I couldn't say.

"Q. Well, would it be more than four highballs? "A. I would say so, yes.

"Q. More than eight highballs?

"A. I couldn't say. I wasn't with him all the time.

"Q. Approximately, how many would you say?

"A. Approximately eight.

"Q. Have you ever seen him have more than eight highballs? "A. No.

"Q. You testified you visited Mr. Houston in his office, was it? "A. Yes.

"Q. Did you notice any change in demeanor between his demeanor in San Francisco and his demeanor here in Lakeview? "A. Yes.

"Q. What was the difference? [182]

"A. Here he was 'Wild Bill,' and there he was the manager for the New Zealand Insurance Company.

"Q. In other words, he was reserved and refined in San Francisco, is that correct?

"A. Correct.

"Q. What did Mr. Houston normally dress in here in Lakeview?

"A. Cowboy boots, jeans, and cowboy hat.

"Q. Would you describe this difference in de-

(Deposition of Virginia Wilkerson.)

meanor here in Lakeview and in San Francisco as a 'Jekyll and Hyde' transformation? Is that an apt description? "A. Yes.

"Q. Did Mr. Houston's dress appear unusual here in Lakeview? "A. No.

"Q. Was it unusual for people of his occupation and standard of living to dress as he did?

"A. No.

"Q. Did Mr. Houston suffer an automobile accident in the month of October, 1953?

"A. Yes.

"Q. Who was present in the car with him?

"A. I don't know.

"Q. You don't know? Did Mr. Houston ever discuss with you that accident? [183]

"A. Yes.

"Q. Did he tell you who was with him?

"A. He told me three different stories.

"Q. Tell us those stories.

"A. One was that he was alone; one is that he was with Mr. Irby and a girl; and one is that he was just with the girl.

"Q. And what was the profession of this girl?

"A. Prostitute.

"Q. What color hair did she have?

"A. Purple.

"Q. Following this accident, did Mr. Houston ask to borrow money from you? "A. No.

"Q. Did he ask to borrow money from your father? "A. No.

"Q. Or your brother? "A. No.

(Deposition of Virginia Wilkerson.)

"Q. When was the first time you *say* Mr. Houston following this accident?

"A. Oh, the evening after the accident.

"Q. And was this girl present also when you saw him? "A. Yes.

"Q. Who else was present when you saw him?

"A. Mr. Van Doren, Mr. Hill and Mrs. Hill and [184] Mr. Irby.

"Q. Is that all? "A. That's all.

"Q. Was Gordon Long present?

"A. No.

"Q. Where was this that you saw him?

"A. Hunter's Lodge.

"Q. And that is a cocktail lounge, is it not?

"A. Yes. But the girl wasn't in the cocktail lounge.

"Q. Where was the girl?

"A. In one of the rooms.

"Q. What was Mr. Houston doing that evening? Was he drinking?

"A. He had had a drink.

"Q. Now, did you observe this girl make a phone call? "A. No.

"Q. Did you observe Mr. Houston hand her any money? "A. No.

"Q. Did Mr. Houston tell you that he had handed her some money? "A. Yes.

"Q. How much?

"A. A thousand dollars.

"Q. Would you describe Mr. Houston as being a selfish person? [185] "A. Yes.

(Deposition of Virginia Wilkerson.)

“Q. And what do you base that statement on?

“A. Well, he wasn’t considerate of other people, let’s put it that way.

“Q. Can you give us an instance, an example?

“A. Oh, wearing his boots in the house with mud on them.

“Q. Against your objections, is that correct?

“A. Yes.

“Q. Can you give us another example?

“A. (Hesitates) Oh, dropping us off at 5:00 and saying he would be back at noon and not showing up until 5:00 at night.

“Q. Would you say that Mr. Houston liked a roaring good time? “A. Yes.

“Q. Let me ask you this, Mrs. Wilkerson—would you say that Mr. Houston when he was up here without his wife would be under the influence of alcohol a great deal of the time?

“A. Yes.

“Mr. Clausen: That is all.

Mr. Clausen: Then there is cross-examination by Mr. Cooper, Mr. Cooper being the local attorney at Lakeview, Oregon, who took the deposition for the plaintiff in this [186] matter or appeared in it.

“By Mr. Cooper:

“Q. You say, Mrs. Wilkerson, that you knew this man for a period of about 10 years. I wish you would enlarge on that answer and give the record the nature of that acquaintance.

“A. Well, he came as a friend of my father’s, and in a period of 10 years he was up probably

(Deposition of Virginia Wilkerson.)

four or five times a year and always came to our house or stayed at our house.

“Q. Now, what business is your father engaged in in the community? “A. Real estate.

“Q. Does he handle insurance?

“A. Yes.

“Q. Did he handle the New Zealand line that Mr. Houston has or not, do you know?

“A. I don't know.

“Q. Over this 10-year period has your family maintained sort of a hunting and fishing lodge west of Lakeview called Sprague River?

“A. Yes.

“Q. How many miles is that?

“A. Forty.

“Q. Did Mr. Houston have a place nearby?

“A. Yes. [187]

“Q. Did you ever see Mr. Houston bring his wife to that spot of his out there? “A. Yes.

“Q. How far apart were the two?

“A. About a mile.

“Q. His place wasn't very—what you would call ‘pretentions,’ was it? “A. No.

“Q. Do you know whether or not there were any members of the Houston family besides Mr. Houston and his wife? “A. Two girls.

“Q. How old were they, going back to the first time you saw them? How old would you say they were? “A. About 18 and 21.

“Q. About how many years ago, would you say, prior to 1953?

(Deposition of Virginia Wilkerson.)

“A. I don’t remember exactly when the girls started coming up. Chuckie was 21 and Ann 18 when they started coming up.

“Q. Just approximately, how many years ago was that, this being 1955, that you first saw the daughters up here?

“A. About five years ago.

“Q. And most of the testimony this morning revolved around him in 1953. That would be about 1951, would you say? [188]

“A. Let’s see. Yes, I would say it was about 1950 or 1951.

“Q. Where did Mrs. Houston and the daughters sleep or live when they came up here?

“A. At the cabin.

“Q. Out on Sprague River, that you referred to? “A. Yes.

“Q. Didn’t stay in your home, I understand?

“A. No.

“Q. Where did Mr. Houston stay at that time, do you know?

“A. At the cabin with them.

“Q. About how long would the wife stay on those visits, if you know?

“A. Sometimes two weeks.

“Q. And the daughters?

“A. Yes, they all came together.

“Q. Would the daughters and the mother leave together, or would one or the other outstay the other?

“A. They usually left together.

(Deposition of Virginia Wilkerson.)

“Q. Did the women folk in the family hunt and fish?

“A. Yes. They liked to fish.

“Q. Did you ever fish with them?

“A. No.

“Q. Did Mr. Houston fish with them, do you know? [189] “A. Yes. He did.

“Q. Now, turning to the answer which the Defendant has filed in this case, Mrs. Wilkerson, I am reading from Paragraph II of the First Affirmative Defense—the statement is made by the Insurance Company that Mr. Houston represented at the time he applied for the policy that he was a social, or occasional drinker.

“Mr. Clausen: Just a moment. That isn't the representation there. May I see it first?

“Mr. Cooper: I am referring to line 5.

“Mr. Clausen: I think it would be better if you read the allegation itself.

“Mr. Cooper: All right. I will read from Paragraph II on lines 4, 5, and 6. These are representations which the Insurance Company said Mr. Houston made when he applied for a policy, to wit: ‘That the said William Mark Houston used alcoholic stimulants only “socially” and only “occasionally”, and never used alcoholic stimulants to excess.’ Take any one of the years of your acquaintanceship with Mr. Houston. As I understand your testimony, you know nothing about what he did at the San Francisco or Berkeley end of the line, is that true? “A. True.

(Deposition of Virginia Wilkerson.)

“Q. And all you saw or observed was what happened [190] up here in Lakeview?

“A. True.

“Q. And what per cent of the year that you saw him at Lakeview did that consist?

“A. Not more than four or five times a year.

“Q. And that would be scattered over, I assume, several months? “A. (Nods head)

“Q. You mentioned fishing. Was he a man that liked to fish? “A. Yes.

“Q. Generally speaking, when is the fishing season open in this part of Oregon?

“A. Oh, May.

“Q. Around May?

“A. I believe so.

“Q. And continues on through the summer?

“A. Yes.

“Q. Now, we have a little different deer season than California, do we not; by that I mean the time of the year. “A. I don't know.

“Q. You don't know that? “A. No.

“Q. This year, when did the deer season open in [191] Oregon, do you know that?

“A. I can't remember the exact date.

“Q. Did you go hunting this year?

“A. Yes.

“Q. When did you go hunting this year?

“A. I didn't go until the second—I believe it opened on a Saturday and I went on a Sunday.

“Q. What month would that be?

“A. That would be in October.

(Deposition of Virginia Wilkerson.)

“Q. Going back to 1953, were you on any hunting party with Mr. Houston—in the fall of 1953? By hunting I mean deer hunting? “A. Yes.

“Q. What time of the year was that?

“A. October.

“Q. Can you give us the season of 1953 for ducks and geese in relation to the deer hunting season?

“A. They follow one another.

“Q. Which follows which?

“A. The duck follows the deer.

“Q. So that would be after October?

“A. It would be in the middle of October.

“Q. And then extending on so long as the season happened to be? “A. Yes. [192]

“Q. Were you on any duck hunting or goose hunting parties with Mr. Houston or other parties in 1953 here at Lakeview? “A. Yes.

“Q. To the best of your memory, when was the last time, approximately, that you saw Mr. Houston in 1953 here at Lakeview?

“A. Probably at the end of the duck season.

“Q. The government changes the season every year. Could you give us a fairly good date for that in relation to, say, take Thanksgiving or Christmas?

“A. I would say it was the middle of November—that was the last time I saw him here.

“Q. You would put it, then, just a few days before Thanksgiving? “A. Yes.

“Q. The last time you saw him in Lakeview?

“A. Yes.

(Deposition of Virginia Wilkerson.)

“Q. Coming back to the quotation I read from the Defendant’s answer a while ago, would you classify Mr. Houston, from what you saw him, as a ‘social’ drinker—from your own personal knowledge, not from what anybody else says about him?”

Mr. Clausen: To that, Your Honor, we object on the ground it calls for the conclusion and opinion of [193] the witness as to a fact and also as to the law whether the witness would classify Mr. Houston as a “social” drinker.

Mr. Angell: There is no objection to the question, to the form of the question, was not at the time.

Mr. Clausen: The objections are reserved.

Mr. Angell: Well, save and except as to the form of the question. The objection was not reserved. If you had any objection to her answer in this, I think you should have stated, so Mr. Cooper could reframe it.

Mr. Clausen: No, I am objecting not to the form, to the substance. I am addressing myself to what you pointed out yesterday when you asked me to follow this procedure of having my son read this for the reason that you could make objections. My objection is, Your Honor, that this particular answer is incompetent, irrelevant and immaterial in that it would be the conclusion of the witness. The question is this, he refers to the quotation in the Answer and then he asks the witness whether the witness would classify Mr. Houston as the kind of a drinker embraced within the allegations in the

(Deposition of Virginia Wilkerson.)

Answer. Now, I say that calls for the opinion and conclusion of the witness.

The Court: Submitted?

Mr. Angell: Beg pardon?

The Court: Is the matter submitted?

Mr. Angell: Yes. [194]

The Court: The objection will be sustained.

Mr. Clausen: The same for the next question.

Mr. Angell: Now (Reading deposition).

“Q. Now, about ‘occasionally’—would you say whether he was an ‘occasional’ drinker or otherwise?

Mr. Clausen: The same objection, Your Honor; there again, the use of the word “occasionally” there, that is put in quotes just as in the prior question, the prior question to which I objected where the word “social” was put in quotes. The same objection, refers to the allegation in the Answer, and the witness is being interrogated as a matter of conclusion as to whether the man falls within a category embraced within an allegation of the Answer.

Mr. Angell: My understanding is that when you ask a question of a witness and calling for the conclusion, that that objection is made because that is the form of the question, namely, that it calls for the conclusion of the witness, and if your objection had been made at that time it would have allowed Mr. Cooper to then go down and try to piece by piece take out just how much she saw of her own of Mr. Houston’s drinking.

(Deposition of Virginia Wilkerson.)

The Court: The same ruling. Let us proceed.

Mr. Angell: (Reading)

“Q. Going back to the hunting trips, just explain who would go. Would your father go, usually?

“A. Yes.

“Q. And yourself? “A. Yes.

“Q. I am talking about the trips Mr. Houston went on. “A. Yes.

“Q. How many hours would they last, as a matter of duration?

“A. Well, usually all day.

“Q. You would go out early in the morning and not get back until after shooting time at night. And that could be quite a few hours, could it not?

“A. Yes.

“Q. Did you ever see drinks served on those hunting parties? “A. Yes.

“Q. Did you ever see Mr. Houston take one?

“A. Yes.

“Q. Did you take one? “A. Yes.

“Q. Your father? “A. Yes.

“Q. The rest of them in the party?

“A. Uh huh.

“Q. Now, then, bringing Mr. Houston in from the [196] streams and the fields do you know whether or not, or would you say whether or not he attended many inside events here in town? By that I mean dinner parties in homes, or would he ever go to a public dance or private dance here that you know of, or not?

“A. Yes. Several homes.

(Deposition of Virginia Wilkerson.)

"Q. Did he ever come to your house for meals?

"A. Yes.

"Q. To the Longs?

"A. He has several friends around.

"Q. Did you ever see him at any public gathering?
"A. Yes.

"Q. By that I would mean a show or a—

"A. (Interrupting) At the bull sale, parties and things like that.

"Q. Bull sale—that is an annual sale of livestock in the community, is it not?

"A. Yes.

"Q. Did you ever ride with him in an automobile to and from hunting parties, or to and from social events outside of your home?

"A. Yes.

"Q. Did you feel yourself safe with him at the wheel?
"A. He was pretty fast.

"Q. A fast driver? [197] "A. Yes.

"Q. Did you feel yourself safe from the standpoint of the amount of liquor he may or may not have consumed?

Mr. Clausen: Just a moment. Your Honor, we will again object on the ground that the answer shows the conclusion or opinion of the witness and is objectionable from that standpoint: "Did you feel yourself safe from the standpoint of the amount of liquor he may or may not have consumed?"

The Court: It will be sustained.

Mr. Angell: (Reading)

(Deposition of Virginia Wilkerson.)

“Q. Did you ever have a car accident with him?

“A. No.

“Q. This is a rather general question, I know. It is probably difficult for you to frame an answer, but I wish you would do it as best you could. Going back over the 10 years of acquaintanceship with Mr. Houston, and the times you were in automobiles with him that he drove, going to and from hunting and bull sales, or anything else the two families may have participated with him in, about how many miles would you say you had ridden around this county, that Mr. Houston was at the driver's wheel? Just do the best you can.

“A. I would say approximately 200.

“Q. How far is it out to your lodge, the fishing lodge? [198]

“A. Forty.

“Q. And back is forty, is it not?

“A. (Nods head)

“Q. Would you say you made ten trips out and back when he was the driver?

“A. I don't believe I ever drove out to the cabin with Mr. Houston.

“Q. Have you taken trips when your father was the driver and you and him the passengers?

“A. Yes.

“Q. There has been some testimony here regarding a community named Plush. That is east of here, is it not?

“A. Yes.

“Q. About how many miles east of here?

“A. About 40.

“Q. That is in Warner Valley, is it not?

(Deposition of Virginia Wilkerson.)

"A. Yes.

"Q. Did you ever go to Plush with your father, Mr. Houston and possibly others to hunt?

"A. Yes.

"Q. You went there for ducks and geese, did you not? "A. Yes.

"Q. Did you ever ride in a car where he was the driver? [199] "A. Yes.

"Q. How many trips would you say that you were a passenger and he was the driver?

"A. Only one.

"Q. One to Warner? "A. Yes.

"Q. What year was that in relation to 1953?

"A. 1953.

"Q. Can you tell us who else was present on that particular trip?

"A. Allen Greenwood and Mr. Irby and Mr. Long.

"Q. This Mr. Long? We have several Mr. Longs.

"A. Gordon Long.

"Q. Now there was some reference here a while ago in the questions asked by Mr. Clausen regarding Mr. Houston's remedies for various things, and I think Mr. Clausen mentioned ulcers. Does your father have ulcers? "A. Yes.

"Q. How many years has he been bothered with ulcers, would you say?

"A. Ever since I can remember.

"Q. And you are upwards of 20 years of age, are you not? "A. Yes. [200]

"Q. You said a while ago that you were fairly

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certain that you had seen occasions when Mr. Houston had had perhaps as many as eight highballs. Isn't that about what you said?

"A. Yes.

"Q. Now, going back to any one of those occasions or all of them, if there is more than one—take them up as you remember them. How many hours over a period of time would such a situation exist?

"A. We would come in and have cocktails after hunting, about sundown.

"Q. About sundown—and have dinner, then usually stay at Hunter's Lodge?

"A. We usually ate there or at home, either one, usually around 12 at night.

"Q. And what I am trying to find out is whether or not the occasions you would refer to when you answered Mr. Clausen's question or questions just such as you described—now possibly a drink at sundown and maybe one before dinner or at dinner, and on into the evening? "A. Yes.

"Q. About how many hours would that be?

"A. Oh, I would say from 6 until 12.

"Q. In other words, it would be about a 6-hour period? [201] "A. Yes.

"Q. If he had 6 of them, that would be one an hour, would it not? "A. Yes.

"Q. Now, Mr. Clausen asked you whether or not you felt the man had a 'Jekyll and Hyde' personality, and you said you thought he did. What do you mean by that?

(Deposition of Virginia Wilkerson.)

“A. He was a completely different person in San Francisco than he was up here.

“Q. In San Francisco, as I understand your testimony, and all you are testifying to is your personal knowledge, the times you saw him there was in his office? “A. Yes.

“Q. He was in the insurance business, was he not? “A. Yes.

“Q. We can all agree to that. And where was his office related in relation to the business center of San Francisco?

“A. Montgomery Street.

“Q. Down the center of town?

“A. Yes.

“Q. How many times did you visit him in his office? “A. Just once. [202]

“Q. Can you give us the year in which you paid that visit?

“A. It was 1954. It was just at the time of the East-West Game. That would be 1954.

“Q. You remember it in January, 1954?

“A. Yes.

“Q. It is alleged in the complaint and admitted in the Answer that he died on February 22, 1954, so it would be just the month preceding his death?

“A. (Nods head)

“Q. Who else was present at the time of that visit? “A. My father.

“Q. How long did you stay at his office?

“A. Possibly half an hour.

“Q. What did you folks talk about?

(Deposition of Virginia Wilkerson.)

“A. Hunting, and the ranch that he was interested in here.

“Q. You mean he had a financial interest up here? “A. Yes.

“Q. Recalling as best you can his conversation upon that occasion, were his remarks rational?

“A. Yes.

“Q. Were his remarks relating to his ranch investment out here? [203] “A. Yes.

“Q. Just tell us what he said about the ranch, if you can recall.

“A. Well, he wanted to raise purebred cattle, and dad was trying to get hold of cattle for him to put on his ranch.

“Q. Was your father a joint owner with him at the ranch? “A. Yes.

“Q. How long has your father been in business here in Lakeview, approximately? Give us the years. “A. Fifty.

“Q. Fifty years? “A. (Nods head)

“Q. Did your father agree or disagree that the placing of good stock on the ranch was a good move, or not?

“A. He thought it was a good idea.

“Q. Mr. Houston thought it was, too?

“A. Yes.

“Q. They talked about getting livestock to put on the ranch? “A. Yes.

“Q. Now, then, coming to the portion of the conversation that related to hunting—what did

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[204] Mr. Houston say about that subject, if you can recall?

"A. Just what a good time he had and the bag limit he got.

"Q. His conversation—was it restricted to past hunts or future hunts? "A. Both.

"Q. You said a minute ago he said something about what kind of limits—how good the hunting had been, and things like that?

"A. Yes.

"Q. Did he have reference to the preceding fall?

"A. Yes. They were plaining grain so they could make it good hunting down on the ranch.

"Q. I wish you would repeat that answer. They were talking about grain? "A. Yes.

"Q. Tell us again what you said.

"A. They were talking about the grain and where they planted it, so they could—

"Q. (Interrupting) The grain was in the ground, as I understand your testimony, when this conversation took place in Mr. Houston's office?

"A. Yes.

"Q. And they planted the grain expecting a visit from the ducks and geese? [205]

"A. Yes.

"Q. When the crop came up, is that right?

"A. Yes.

"Q. And that would be the 1954 crop, would it not? "A. Yes.

"Q. Now, you testified a while ago that in talking hunting, Mr. Houston was talking about the

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past, and was talking about the future. By the future you mean his remarks about the grain crop and the availability of feed for the 1954 duck and goose flight? "A. Yes.

"Q. Did he make any other reference to hunting?

"A. Stocking the pond with fish.

"Q. Where is this pond located, do you know?

"A. I think they were referring not to a pond, but the river between the two cabins.

"Q. Now, going back to 1953, and the years prior thereto, was it the customary practice for anyone, including the State of Oregon, to plant fish in that Sprague River that runs down by the cabins? "A. Yes.

"Q. Now, for the benefit of this record, this Sprague River is by these cabins about forty miles west of Lakeview? "A. Yes. [206]

"Q. What direction does Sprague River run?

"A. West.

"Q. Comes out of what direction?

"A. East.

"Q. And you mentioned a while ago that your father had a cabin out there. Is that right?

"A. That's right.

"Q. Situated near or far away from the stream?

"A. Near.

"Q. How far away and what direction was the cabin of Mr. Houston?

"A. About a mile east.

"Q. Up the stream? "A. Yes.

(Deposition of Virginia Wilkerson.)

"Q. Is that good fishing water between the two cabins? "A. Yes.

"Q. Coming back to the year 1953 and prior thereto, what was done by whom to plant or stock the stream with fish?

"A. They were planning to stock the fish between the two cabins.

"Q. I am talking about before that.

"A. They had stocked it once before.

"Q. Who are 'they'? [207]

"A. Mr. Houston and Mr. Utley, and I believe Mr. Wilkes was in on that, too.

"Q. Where did they obtain those fish, if you know? "A. I don't know.

"Q. Who brought them in and how?

"A. They brought them in in trucks.

"Q. Do you know whether or not they were State of Oregon fish, or a private supply?

"A. Private supply.

"Q. In about what year had they done that?

"A. About 1950.

"Q. As I recall your testimony before lunch, at the time you and your father visited the office of Mr. Houston in San Francisco in January, 1954, they talked of plans of restocking this Sprague River, is that right? "A. Right.

"Q. Just tell us what they said about it. That is the best way to bring it out, I think.

"A. They were talking about doing the same thing next year.

"Q. What did Mr. Houston say about it?

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“A. I can’t remember their exact conversation or words.

“Q. What did they say in substance? [208]

“A. That the stream had been—a few of the holes had been dynamited and had killed quite a few fish, and they were going to restock it.

“Q. Do you mean Mr. Houston or your father dynamited it?

“A. No. Someone else.

“Q. Speaking now about Mr. Houston, did they talk about the cost of restocking the stream?

“A. I couldn’t say.

“Q. Did they talk about sharing or dividing the cost between themselves or with others?

“A. Yes. With Mr. Wilkes.

“Q. This restocking was to be done in what year? “A. 1954.

“Q. This conversation took place in your presence in January, 1954, is that right?

“A. Yes. Or December just before.

“Q. You spoke about the East-West game?

“A. Yes.

“Q. Had you gone to the game?

“A. No. It was before the game.

“Q. Would you describe it as being in the Christmas holidays or New Year’s holidays?

“A. Yes.

“Q. The fishing season started, I understood you [209] to say, generally speaking, the first of May? “A. Yes.

“Q. What was their planning regarding hav-

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ing the fish in the stream by the time the season opened?

“A. I don’t know about that.

“Q. They didn’t say?

“A. They didn’t say.

“Q. Do you recall any other subjects talked about in that visit that you and your father made to Mr. Houston’s office insofar as any business matters or activities were concerned?

“A. No. It was mostly social.

“Q. Now, this morning Mr. Clausen used the words ‘Jekyll and Hyde’ and asked your opinion as to whether you would fit them to Mr. Houston. Just what did you have in mind? Will you elaborate on the answer you gave him so we can have the record show exactly what you have reference to? Did you ever read the story about Jekyll and Hyde?

“A. Yes. His manner of dress and in being so very quiet down there and quite noisy up here.

“Q. As Mr. Clausen said at the beginning of the taking of the deposition of the gentleman who preceded you, and he may have said as much when we commenced taking your deposition—he stated the defenses in [210] this case. I will refresh your memory. Even though he may have done so, the first defense of the Insurance Company relates to certain alleged misrepresentations by Mr. Houston as to the nature and scope of his drinking appetite. The second answer admits that Mr. Houston died on February 22, 1954, but it goes on to say this,

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and I quote from Paragraph III of the Second Affirmative Defense: 'That the death of said William M. Houston on or about February 22, 1954 resulted from suicide.' Now, you say that Jekyll and Hyde expression you used was in reference to his manner of dress, etc.?

"A. (Nods head)

"Q. As I understand your testimony, you never saw him but once in his own home town, which was San Francisco, is that right?

"A. No. I have seen him several times, but that was the only time I went to his office.

"Q. Where else did you see him in San Francisco?

"A. In our hotel. Every time we went down we always went out somewhere.

"Q. In other words, the two families would grab a date together. Would his wife and daughter accompany him?

"A. No. Father has been down several times, but Charlotte has always been out of town when I was down there with my husband. [211]

"Q. So you and your husband, or father, and Mr. Houston would get together for a social hour or something? "A. Yes.

"Q. And what was the nature of his dress at that time?

"A. Very proper—business suit.

"Q. He wore a business suit at this visit to the office, as you recall? "A. Yes.

"Q. So as I understand your testimony, when

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you were referring to the descriptive words of 'Jekyll and Hyde' of Mr. Clausen, you were in no way referring to his mental condition?

"A. No.

"Q. Going back to that last fall when Mr. Houston was here, and I am talking about the fall of 1953—you testified that you were out on deer hunting parties that fall with him and you went out to Plush once to a duck hunt. Is that right?

"A. Yes.

"Q. Did you go on any other duck and goose hunting trips with him that fall? "A. Yes.

"Q. What valley or valleys were they taken to? [212]

"A. Right behind the house—the Bernard Ranch.

"Q. You have good shooting within a short distance of your home, do you not?

"A. Yes.

"Q. About how far from there?

"A. About a mile.

"Q. At the so-called Bernard Ranch?

"A. Yes.

"Q. Your father's firm has an interest in that ranch? "A. Yes.

"Q. It owns it, does it not?

"A. Yes.

"Q. Now, in the course of those associations with Mr. Houston in the fall months of 1953, at any time or any place here in Lake County did

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he and yourself and others who were present discuss, say, politics? "A. Yes.

"Q. Did Mr. Houston participate in those discussions? "A. Yes.

"Q. Were his remarks, viewpoints, and comments, in your opinion, rational regarding that subject? "A. Yes.

"Q. Now, in the course of the associations that you had with Mr. Houston and his hunting companions and [213] dinner companions during the fall of 1953, were such subjects as the stock and bond market or the stock market or investments discussed? "A. Yes.

"Q. And did Mr. Houston take a part in those discussions? "A. Yes.

"Q. And did he in the course of participating therein express his opinion as to the value or lack of value of different stocks and bonds that could be bought or were available, and in the course of his discussion did he give reasons why he thought a certain stock might be good or another one might be bad or doubtful?

"A. Yes. He discussed it like anyone would.

"Q. In the course of listening to his discussions of that subject, stock and bonds and the stock market, did you gain the impression that his remarks, his viewpoints and opinions were those of a rational person? "A. Yes.

"Q. Now, upon that same type of occasion, were public affairs,—by that I mean the national pic-

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ture, world affairs—did they enter into discussions from time to time? “A. Yes. [214]

“Q. Did Mr. Houston express himself upon these occasions as to such subjects?

“A. Yes.

“Q. And was his conversation and his opinions at that time on that subject rational, in your opinion? “A. Yes.

“Q. Now, you have testified that over the 10 years that you knew Mr. Houston that he was attracted to this community primarily because of hunting and fishing. Is that a correct statement to make? “A. Yes.

“Q. And I assume from that that it is reasonable to say that wildlife and wildlife problems interested him. Is that right? “A. Yes.

“Q. A fair statement to make?

“A. (Nods head)

“Q. In the course of your acquaintance with him over that 10-year period, did you ever hear him discuss his opinions as to our various species of wildlife and what should be done to improve their habitat, or what should be done to encourage them to multiply, or what might be done to protect them from predators, etc.? Did you ever hear him discuss those subjects? “A. Yes. [215]

“Q. Were his discussions upon that subject, in your opinion, rational? “A. Yes.

“Q. Now, going back to when you first met him, at the beginning of this 8, 9, or 10-year period and taking these subjects that I have enumerated here,

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and comparing his remarks of 8, 9, or 10 years ago with his remarks during the last several months that he was a visitor here in the Lakeview community, did you see any difference or any contrast as to the quality of his mental attitude toward thinking out and discussing these problems?

“A. Well, he was more enthused because he was acquiring property.

“Q. Acquiring property here? Enthused about the Lakeview community? “A. Yes.

“Q. Upon such subjects as wildlife, the stock market, or anything of that nature, was there anything in his discussions of the last few months you knew him that led you to be alarmed or suspicious of his mental outlook on life or on those subjects?

“A. (Shakes head)

“Q. Going back to one of the early questions that Mr. Clausen asked you here today, and I am referring to [216] the question relating to where he asked you as to whether or not you were hostile to this defense of suicide, you remember him asking you that question? You answered ‘yes’ to that question, did you not? “A. Yes.

“Q. I want you to elaborate and testify why you take that attitude to the claim that the man shot himself?”

Mr. Clausen: Your Honor, to that we object on the same ground as before. The question is referring to the allegations of the Answer and in this particular case the vice is even worse. Not only is the witness asked an opinion as to the allegations

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in the Answer but the witness here is asked to give an opinion as to why the former answer on that subject was given. In other words, it would be argumentative. The question was asked the witness why the answer was given, which itself is argumentative and is even going further than that, Your Honor. It is asking a reason why on a matter of opinion, so we object on that ground.

Mr. Angell: May I answer that? I think your objection would be good, Mr. Clausen, I do not think that either expert or lay testimony as to whether one thinks one committed suicide is a valid question. However, when anyone opens the door on this subject on direct examination, I think it is quite proper then for the other side to find out what they meant by it, and Mr. Clausen, in taking this deposition, [217] said:

“You are aware of the suit now pending, in which you are giving testimony, in which Mrs. Charlotte Houston is suing the Canada Life Assurance Company, the Assurance Company raising the defense of suicide, one of the defenses. Do you consider yourself hostile to that defense?”

The answer is “Yes.”

Now, here, Mr. Cooper is merely asking her what she meant when she said, “Yes” in answer to a question asked by counsel for the Canada Life. I submit on cross-examination one has the right to ask the witness what they meant by an answer they gave to a question asked by the counsel whose witness she was.

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Mr. Clausen: In answer to that, Your Honor, may I point out that the purpose of the question of my son in putting this to the witness was evidently because the witness was a long-time friend of the family and the decedent and the question was to establish the relationship, in other words, the witness was hostile to the defense or any defense from the relationship and, under Rule 43-B of this court, that having been established, we then can proceed in a different fashion, and that was the purpose of laying the foundation.

Now, here, the question he was asking says: "I want [218] you to elaborate and testify why you take that attitude to the claim that the man shot himself."

Well, Your Honor, I say that that is a wide-open door, it is calling for opinion and conclusion, it is asking for an opinion on the very fact that Your Honor is supposed to find.

The Court: The objection will be overruled. He may answer.

Mr. Angell: (Reading)

"Q. I want you to elaborate and testify why you take that attitude to the claim that the man shot himself.

"A. It is my own personal feeling that he didn't do it.

"Q. Do you base that feeling on this 10 years of acquaintanceship with the man?

"A. Yes"—

Mr. Clausen: Now, Your Honor, may I, without

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interrupting, to save the Court's time, have my objection run to this line of interrogation? I am speaking specifically of opinion evidence as to whether the man did or did not shoot himself deliberately.

The Court: What is the purpose of the offer?

Mr. Angell: The purpose of the offer is that the question is only following up on what Mr. Clausen himself opened up, Your Honor. [219] He says it was put in to show the lady was a ten-year friend of the Houstons. Well, of course, the simple way to do that is just to ask the lady whether she had been a friend of the Houstons for ten years. He didn't ask that. He asks the question whether she was hostile to the defense in this case of suicide and her answer says she was.

Now, then he says—well, on cross, “Would you say why you are hostile to it?” And she says: “My own personal feeling that he didn't do it.”

Now, he then goes on: “Do you base that feeling on this ten years of acquaintanceship with the man?”

Now, it is all directed to why she answered that question on direct that way.

The Court: For that limited purpose, I will allow it. Let the record stand.

Mr. Clausen: Your Honor, may I just make this clear——

The Court: Yes.

Mr. Clausen: I want the record clear that, I didn't want your Honor to be misled by counsel,

(Deposition of Virginia Wilkerson.)

he has referred to "he asked" and "he asked." These questions here that he is asking were not asked by my son. These were asked by Mr. Angell's corresponding counsel there.

Mr. Angell: The question that I referred to as "he asked" was a question—was questions which your son as counsel for Canada Life asked this lady when he first started [220] out, and he said: "Do you consider yourself hostile to that defense?" Just before that he had stated that one of the defenses was the claim that Mr. Houston had committed suicide. The witness answered "Yes."

Now, as I said before, I do not take the position that this witness is qualified to testify whether Mr. Houston committed suicide or didn't or whether it was accidental or wasn't. All I am saying is that counsel for the defendant here, having opened up the subject to what her attitude was, not towards whether she was a friend or whether she was hostile—lots of friends are not hostile; they like to tell the truth whenever they are a witness—but she was asked whether she was hostile to the defense of suicide in this case.

Mr. Clausen: I know all that, Mr. Angell. The point I am making is to clarify and make very clear—

The Court: I can indicate to you now that I am limiting—your position that is calling for the opinion and conclusion of this witness, your legal position is correct—I have limited this testimony

(Deposition of Virginia Wilkerson.)

for the purpose of the offer, the explanation of testimony that has gone previously.

Mr. Clausen: All right. These questions on page 28 were not asked by my son and were asked by counsel for Mr. Angell.

The Court: Yes.

Mr. Angell: I think, Mr. Clausen, the point is this, that—— [221]

Mr. Clausen: The court has ruled. I am sitting down.

Mr. Angell: All right. Then we will go on:

“Q. Do you base that feeling on this ten years of acquaintanceship with the man?

“A. Yes.

“Q. Now, in response to another question by Mr. Clausen, you said in words or in substance that Mr. Houston was selfish, and you went on to say that he wasn't considerate of others. This is about what you said, was it not?

“A. Yes.

“Q. Would you care to qualify that answer by telling us whether or not in the use of the word 'selfish' you meant that he was selfish with his worldly goods?

“A. I don't understand the question.

“Q. When you said he was selfish, did you mean to imply that somebody might hit him up for a loan and be refused or somebody might want to borrow a car and be refused?

“A. No.

(Deposition of Virginia Wilkerson.)

“Q. Did you ever see Mr. Houston down here at the annual Rotary Club livestock auction?

“A. Yes.

“Q. Did you *ever him* make one or more purchases there?”

Mr. Angell: There is apparently a word omitted there.

“A. Yes.

“Q. And based upon your acquaintanceship in the community, [222] can you tell us briefly what the money is used for that is paid in there for purchases at the Rotary Junior livestock sale?

“A. To give the children a chance to raise stock and to forward agriculture.

“Q. And livestock raising?

“A. And livestock raising.

“Q. Isn't it true that the money paid in by purchases is paid on to the children as a reward for their efforts or their activities?

“A. Yes.

“Q. So when you say Mr. Houston was selfish, you weren't referring to an action of that kind?

“A. No.

“Q. You would say he was unselfish?

“A. Yes.

“Q. As I understand your testimony, you are restricting your use of the word to some personal habits of coming into the house as a guest and not cleaning the mud off his shoes, or something like that?

“A. Yes.

“Q. Now, these frequent hunting and fishing

(Deposition of Virginia Wilkerson.)

trips you say you and members of your family took with Mr. Houston over the years, they cost a few dollars, didn't they, for gas, oil, and transportation and grub, isn't that true?

"A. Yes." [223]

The Court: Pardon me. How many pages have you got left?

Mr. Angell: Beg your pardon?

The Court: How many pages do you have left?

Mr. Angel: Quite long. Must be at least ten or twelve more.

The Court: We will take a recess until two.

(Thereupon an adjournment was taken until 2:00 o'clock p.m.) [224]

Mr. Clausen: May I interrupt the reading of the deposition by calling a doctor out of turn?

Mr. Angell: We will have no objection.

Mr. Clausen: Dr. Bennett, will you step forward, please?

A. E. BENNETT

called as a witness on behalf of the defense; sworn.

The Court: Your full name, Doctor?

A. A. E. Bennett.

The Court: Where do you reside?

A. Berkeley.

The Court: Your business or your occupation is that of a physician? A. Yes, sir.

The Court: Do you specialize in some particular activity?

A. In neurology and psychiatry.

The Court: Take the witness.

(Testimony of A. E. Bennett.)

Direct Examination

Mr. Clausen: Q. You are duly licensed, are you, Dr. Bennett, as a physician and surgeon in the State of California? A. Yes, sir.

Q. And you are a graduate of what school or colleges, Doctor? [225]

A. The University of Nebraska.

Q. And in connection with your chosen work, have you taken certain post-graduate training?

A. Yes, sir.

Q. And what schools or colleges, Doctor?

A. I served in hospitals in Philadelphia connected with the University of Pennsylvania and Johns Hopkins Medical School, three years post-graduate training in neurology and psychiatry.

Q. And in that regard, also, are you licensed in any other states?

A. California and Nebraska.

Q. Are you on any so-called national boards?

A. Well, I don't know quite what you mean.

Q. Well, do you belong to any national boards?

A. Well, I am a certified specialist in neurology and psychiatry by the American Board of Neurology and Psychiatry.

Q. And do you, Dr. Bennett, belong to any societies, medical societies, in connection with your medical practice and specialty?

A. Yes, a good many.

Q. Could you list a few, Doctor?

A. Well, I am a fellow in the American Psychiatric Association, and have been a member of the

(Testimony of A. E. Bennett.)

Q. In your present work, Doctor, do you treat some of those people for those tendencies?

A. Yes. That's the major part of our work.

Q. For example, are some of those people so afflicted with suicidal tendencies, those who the majority of persons would say should be satisfied with their lot in life, but nevertheless do have the suicidal tendencies?

A. Oh, yes. That doesn't have too much to do with the question of suicide. It's a question of mental illness.

Q. In what types of personalities, Doctor, do you categorize this malady types, in that regard, of those who have suicidal tendencies?

A. Well, in general, the bulk of them fall into the depressive reactions, people with morbid depressive reactions are more prone to suicide than others, but we do also see them in other conditions, organic brain diseases and delirious states and others that aren't obviously depressed, but the large majority come in the depressive group.

Q. Are there some types, Doctor, who are both depressed and then at other times sort of happy-go-lucky and combine those two moods with a certain amount of drinking?

A. Yes, that's a very common form known as the manic-depressive [229] type, in which they have periods of moods of elation and periods of depression, and if they are alcoholic those phases are exaggerated with them, as a rule.

Q. Could such a person apparently be one who

(Testimony of A. E. Bennett.)

loved life, be happy at home, happy and successful in business, and yet have suicidal tendencies?

A. Yes, that is correct.

Q. Now, into that category, Doctor, what is the name of the personality that would be of that type?

A. Well, we speak of those as cyclothymic personalities, individuals who are subject to mood swings, either elation or depression, that go beyond the normal. When it becomes excessive, then we have a phase we speak of as hypomania. And when it becomes full-blown, so that their judgment is impaired or that they are unable to make adjustments, then they become psychotic and we speak of them as suffering from manic psychosis—manic-depressive psychosis, but the category is the cyclothymic type of personality.

Q. That is what you call the cyclothymic?

A. Cyclothymic.

Q. Cyclothymic. Now, that particular type, Doctor, is that type subject to swings from depression swings to feelings of remorse on occasions?

A. Yes, over-react to depressive swings, particularly with alcohol or they can go the other way, go into the elated phase. [230]

Q. Now, Doctor, just so we may know your own experience, in how many cases have you treated those; could you enumerate how many cases such as that you have personally handled?

A. Many hundreds; I couldn't give an estimate.

Q. On occasions do people of that kind have certain things that would trigger, as it were, at

(Testimony of A. E. Bennett.)

the moment some part of their body, so that they would take their own life?

A. Trigger some part of the body? Could you clarify that?

Q. What I had in mind, Doctor, a person such as that particular type that you have mentioned, subject to these things, and who, for example, might be fatigued or frustrated or under strain or have had interference with normal sleep and rest, in such a type of personality as you have indicated exists would there be in those things that I have enumerated something which might upset the balance of the person?

A. I think in a general way that that is correct, that excessive mental strain or fatigue or physical fatigue might trigger or set off one of the overt other reactions, but frequently it is responsible—I mean, without any evident or obvious reason for it.

Q. And then on those occasions is it your experience that those people would take their own lives?

A. Yes; in the depressive phase, yes.

Q. That imbalance or that setting off of the balance of interference or reaction upon their sympathetic system? [231]

A. Well, the emotional disorder, depressive disorder, does upset the sympathetic nervous system, if that is what you mean.

Q. Yes. Now, Doctor, assume a person about 50 years old, who is married, with two grown—. By

(Testimony of A. E. Bennett.)

the way, let me ask you, you were present in the courtroom this morning, were you, Doctor?

A. Yes, sir.

Q. And I also let you read a deposition this morning of Jean Pearson—at least you glanced over that deposition? A. Yes, sir.

Q. Now, Doctor, assume a person about 50 years old, married, with two grown daughters, United States manager of a foreign insurance company, the salary about \$20,000 a year, several known pressing debts, accustomed to having alcoholic drinks before lunch and dinner, he is the productive go-getter type, occasionally traveled, on production trips, getting out to meetings and getting business on these occasions, would also occasionally have alcoholic drinks; while in San Francisco engaged in his activities he is reserved and quiet, refined, although of a friendly gregarious extrovert nature, but in Lakeview, Oregon, while on vacation, on hunting trips, without his wife, usually he is in an exhilarated mood; the difference in his demeanor from the San Francisco conduct may be described as a “Jekyll and Hyde” transformation. While in Oregon he dresses in cowboy clothes. On occasion, for example, wears a coonskin cap. He acts rather overbearing, unruly; for example, [232] tried to serve himself in a restaurant, “just takes over,” acted in the parlance of the street as a “big shot.” Monopolizes conversations, been inconsiderate of other people, likes a roaring good time, has been a fast driver, egotistical, yet interested in

(Testimony of A. E. Bennett.)

social work, takes pills and has a cure for everything, has been concerned about his health. On one occasion, for example, fired a rifle in his host's real estate office. Has gone under the nickname of "Wild Bill Hiccup." He would be under the influence of alcohol part of the time. On occasion would begin drinking in the morning, have drinks during the day; accustomed to having drinks during the day. Before his death he was involved in an automobile accident with a woman passenger, whom he demonstrated anxiety to get hurriedly paid, who was paid some thousand dollars, who is rumored to have written him since. His wife, at the time of the police investigation of his death, February 22, 1954, reported to the police substantially that he had periods of depression and recently had been depressed, shortly before his death. His death occurred by gunshot wound through the left breast, the carbine, the muzzle of the carbine pressed against or right close to his breast while leaning over parallel to the floor; his arm able to reach to the trigger of the carbine so that the body is parallel to the floor and the bullet goes up to the ceiling straight up from where the gun was pointing, and this was shortly after he arose at about [233] one-thirty in the afternoon following a dinner party which had lasted until about eleven-thirty the night before, at which party he had some drinks, one or two or more drinks. At the time of his death he is dressed in his sleeping clothes and the shooting occurred in a lower remote

(Testimony of A. E. Bennett.)

corner of the basement of his Berkeley home.

Now, from my description and assumptions here, Doctor, will you tell me whether that individual falls into one of the suicidal types?

Mr. Angell: Just a minute. Your Honor, before that is answered, may I make my objection?

The Court: Yes.

Mr. Angell: I object to the question upon the ground it is compound, unintelligible, assumes facts not in evidence, calls for the conclusion of this witness which is not subject to expert testimony, that there is no showing that this doctor ever examined Mr. Houston, and upon the ground it is not proper examination.

Mr. Clausen: If the Court please, in answer to that, I will say that I feel that it is proper testimony. The case of McClelland vs. Great Southern Life Insurance Company, 220 Southwest 2d 515, it was somewhat similar testimony by a physician of a depressed state and to the effect that this physician, who I believe was the physician of the person, was led to believe the insured had experienced suicidal thoughts. [234]

What I am doing now——

The Court: In that case the doctor examined the patient?

Mr. Clausen: There is a different type of situation as where I believe in this case the doctor was the physician and had examined the party who committed suicide, your Honor.

In my present question, though, I am addressing

(Testimony of A. E. Bennett.)

these remarks—or, rather, the question to a man far more skilled in ascertaining that particular answer than he was asking this doctor about, because Dr. Bennett is an expert by training, experience and study in this very field of suicidal thoughts, and I am giving him the assumptions, your Honor, which the evidence in the case demonstrates plus will demonstrate.

The Court: The court is ready to rule. The objection will be sustained.

Mr. Clausen: Q. Now, Doctor, in the particular type of—I believe you called it cyclothymic personality—would such a type of personality include one who was a successful businessman?

A. Yes, they frequently are extremely successful.

Q. Would such a personality include a person who would be happy at home?

A. Would be happy at home?

Q. Yes. Have a happy home life and—apparently a happy home life.

A. Oh, yes, that's— [235]

Q. And would such a personality include also one who would apparently—during the moments of exhilaration apparently love life?

A. Yes, they are very extroverted outgoing people.

Q. Would such a personality include one who also would have periods of depression and perhaps have been depressed shortly before the death by

(Testimony of A. E. Bennett.)

something that caused depression even though that something might have been relatively trivial?

A. Yes, they invariably have depressive phases.

The Court: What does the record disclose in relation to depression?

Mr. Clausen: That the wife stated to the police officers—. May I have the report?

Mr. Angell: The report isn't in evidence, your Honor.

The Court: What is it?

Mr. Angell: The report which counsel is about to call the court's attention to is not in evidence.

Mr. Clausen: Maybe so, but I am refreshing my own recollection to answer his Honor's question.

The Court: All right.

Mr. Angell: I submit, you can't refresh your recollection on something that isn't in evidence.

The Court: I inquired as to what the evidence disclosed in reference to depressions.

Mr. Angell: Yes. I will answer that directly, your [236] Honor, here from the—that the deceased had been working hard lately and usually was depressed this time of the year.

The Court: Whose testimony is this?

Mr. Clausen: The wife to the police officers on arrival at the scene after the shooting. Officer Pine and Officer Parker, who testified yesterday morning, and the period of the year being the time, your Honor, that the evidence shows, when these statements for the company were due.

(Testimony of A. E. Bennett.)

Mr. Angell: May I see what you are reading from, Mr. Clausen? What is it that you are reading from?

Mr. Clausen: This is a memorandum of the transcript of the hearing before the coroner and was the question that I asked the officers yesterday morning.

Mr. Angell: If your Honor please, I ask now to strike the statement of counsel——

Mr. Clausen: I am answering his Honor's question.

Mr. Angell: May I make my motion, Mr. Clausen? I ask now that the statement of counsel go out as being an incorrect statement of the record, that the record shows that counsel is reading from a coroner's report which, your Honor, is not admissible in evidence, and——

Mr. Clausen: I did not quote this. I am answering his Honor.

The Court: I asked what the record disclosed.

Mr. Clausen: Yes, exactly. [237]

The Court: What does the record disclose in that respect?

Mr. Clausen: That's right, exactly as I stated to your Honor. If there is any question, I would like to have the privilege——

The Court: I want to refresh my own memory in relation to the matter. I don't recall it.

Mr. Clausen: All right. May I have, then, the reporter read back the evidence of Inspector Pine—Mr. Pine—of yesterday morning?

(Testimony of A. E. Bennett.)

The Court: However, I think the best way under the circumstances is to allow the testimony to go in over your objection subject to your motion to strike.

Mr. Angell: May I have the question read, your Honor? I have forgotten what that question was.

The Court: Read it, Mr. Reporter.

(The record was read.)

Mr. Angell: I now hold in my hand, your Honor—I am going to move or ask that my objection go ahead of the answer on the ground that it assumes facts not in evidence in this case. I here have Officer Pine's notes and they are Defendant's Exhibit A, which I hold in my hand. I show it to your Honor. There is not one single word said in those notes about any depression.

The Court: Give it to counsel and let him point it out.

Mr. Clausen: These notes, if the Court [238] please, are not supposed to contain that. Officer Pine, who testified yesterday morning, produced these notes as being his rough notes. His actual testimony, your Honor, is exactly as I have stated, and I would ask the court's permission to have the reporter find it right now.

The Court: We will take a recess and the reporter can find it during the recess.

(Short recess taken.)

The Court: (To Reporter:) You may read the record.

(Testimony of A. E. Bennett.)

The Reporter: (Reading.) (Testimony of Officer Pine on November 7, 1955:)

"Q. All right. And did you have a talk with her——. Well, of course you did. You obtained this information from her? "A. Yes.

"Q. On that occasion was anything said by you to her or she to you concerning the apparent motive of the suicide, any questions of his action and conduct of late? "A. Yes.

"Q. All right. Now, who was present when that statement was made, Mr. Pine?

"A. What statement?

"Q. The statement by Mrs. Houston to you concerning the subject that I just now asked you about.

"A. Well, there was much conversation. I [139] don't—I can't say just who was present at any one time. There was quite a bit of conversation.

"Q. I understand.

"A. Between all of us.

"Q. What did Mrs. Houston say to you on that subject, Mr. Pine?

"A. I asked Mrs. Houston if her husband had at any time threatened suicide.

"Q. Yes. A. And she said no, he hadn't.

"Q. Yes.

"A. And I asked her if he had been planning on doing any shooting or going on a hunting trip.

"Q. Yes.

"A. She said he hadn't.

"Q. Yes.

(Testimony of A. E. Bennett.)

“A. I asked her if he had been under any emotional stress or if he had any problem of late that would cause him to do a thing like that, and she said—at the beginning she said that he had at times suffered periods of depression.

“Q. Periods of depression at times?

“A. Yes.

“Q. And what else did she say on that subject, Mr. Pine?

“A. She said, however, he was in fine spirits over the past weekend, he had been in good [240] spirits of late except that he was working hard, working long hours getting out some reports which were a yearly function with his—in his business.

“Q. Working hard, long hours, getting out reports that were business reports connected with his business, is that correct? “A. Yes.

“Q. Now, these periods of depression to which she referred, did she state whether those periods of depression occurred coincident with his work in getting out such reports for his business?

“A. Well, I just didn’t—she didn’t elaborate and I just didn’t gather what her actual meaning was by ‘periods of depression.’ She said he was under stress at times, like these, when he was preparing these reports.”

The Court: Did you have any knowledge of that before you came here?

A. Did I have knowledge of that?

The Court: Of that testimony.

A. Yes, I had some knowledge. I didn’t have

(Testimony of A. E. Bennett.)

the exact knowledge that I have gotten here today, but I had some information to the effect that the Berkeley police had interrogated her and gotten some sort of a statement about the fact that he was subject to depressive spells.

The Court: Proceed.

Mr. Clausen: Q. And would a personality [241] type that you have mentioned that you call the cyclothymic type, Doctor Bennett, include a person who did have periods of depression?

A. Yes, sir.

Q. And does that personality type have swings in moods from a period of depression to perhaps good spirits and back again to depression?

A. Yes, usually. They are not on an even keel emotionally. They are either—they either go over to the exhilarated or latent phase or depressive stage. They don't stay even, but they are not consistently alternating; they don't have to be, they may be.

Q. Is such a personality type, Doctor Bennett, prone to suicide?

A. Yes, about 15 to 20 per cent of them end up as suicide.

Mr. Clausen: 15 to 20 per cent. You may take the witness.

Mr. Angell: No questions.

The Court: Step down.

(Witness excused.)

Mr. Clausen: May Doctor Bennett be excused, your Honor?

(Testimony of A. E. Bennett.)

Mr. Angell: As far as we are concerned.

The Court: You may be excused, Doctor Bennett.

Mr. Angell: We were reading the deposition. We left off at line 22, but to go back and get continuity, let's step back to line 17.

VIRGINIA WILKERSON

(Reading.)

"Q. So when you say Mr. Houston was selfish, you weren't referring to an action of that kind.

"A. No.

"Q. You would say he was unselfish?

"A. Yes."

Mr. Angell: Now, we have read that far. I will pick up the next question where we were.

Mr. Clausen: What page?

Mr. Angell: Page 29, on line 22.

(Reading.)

"Q. As I understand your testimony, you are restricting your use of the word to some personal habits of coming into the house as a guest and not cleaning the mud off his shoes, or something like that? "A. Yes.

"Q. Now, these frequent hunting and fishing trips you say you and members of your family took with Mr. Houston over the years, they cost a few dollars, didn't they, for gas, oil, and transportation and grub, isn't that true? "A. Yes.

"Q. Was Mr. Houston ever stingy about pay-

(Deposition of Virginia Wilkerson.)

the witness, asking the witness to put a stamp on that—. It is the impression of the witness how a person did a thing, instead of asking what the person did. It would be in my opinion, your Honor, subject to that objection.

The Court: The objection will be sustained. Develop the facts, whatever they be.

Mr. Angell: The only way I can develop the facts here would be through these questions. There were no objections made to these questions at the time the deposition was taken.

The Court: Well, you take it that he waived the objection? [246]

Mr. Angell: I do, very definitely. He didn't object that it was asking for the conclusion of the witness, "Tell us how he handled such a gun, and that sort of thing." Now, obviously it called for an objection to it, and for him to say: I object, it calls for a conclusion; then the attorney obviously would have backed up and got it, elicited the information, and said: What did he do? And here they permitted him to go. This witness's deposition was taken up in Oregon, and obviously if the question is not allowed the answer will not go in. I think Mr. Clausen should have made his objection there, and given the attorney the opportunity to present the testimony.

Mr. Clausen: If the Court please—

Mr. Angell: The court is not bound by it. It is only an observation of the witness.

Mr. Clausen: If the Court please, the stipulation

(Deposition of Virginia Wilkerson.)

of the parties at the outset of the deposition appears to be this:

“It is stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.”

In other words, it wouldn't lie in my mouth now to say that it was a leading question. That's all. But, your Honor, under this stipulation, which is normal in these cases, on the [247] reading of a deposition we can object, exactly as the stipulation said, to the questions.

Mr. Angell: With two exceptions, and that is the form of the question, and one of the forms is a leading question and the other is it calls for the conclusion of the witness.

Mr. Clausen: No——

The Court: Matter submitted, gentlemen?

Mr. Angell: Yes.

The Court: The objection will be sustained. Develop the facts, whatever they may be in relation to the gun, manner carried if any, or if observed.

Mr. Angell: The next question:

“Q. Did he convey the attitude that he was a little wiser than some of the rest of you, or more experienced? Did he convey the impression that he was more experienced in those things than you might be?”

Mr. Clausen: Just a moment. We will object to that, your Honor, on the same ground, whether

(Deposition of Virginia Wilkerson.)

a man, a person, conveys an impression to another person for a third person to guess at what impression the first person conveyed surely calls for a conclusion and the opinion of the witness, asking the witness to guess.

The Court: Objection sustained.

Mr. Angell: (Reading.) [248]

"Q. Did any children ever accompany you and Mr. Houston on these hunting trips?

"A. Yes.

"Q. Whose? "A. My son.

"Q. Take it back to 1953. Did the boy ever go out on a trip then? "A. Yes.

"Q. How old was the boy then?

"A. Eleven.

"Q. He was eleven years of age at that time?

"A. Yes.

"Q. And Mr. Houston was on that hunting trip with you, was he? "A. Yes.

"Q. And who drove the vehicle, between the three of you—you and the boy, or him, or were you in the same vehicle, same car?

"A. Well, golly, we have been deer hunting and duck hunting both. It is hard to remember.

"Q. When you and the boy, your son, I mean, and Mr. Houston would come back in a motor vehicle from a deer hunt, what was the practice on your part and your son's part, so far as taking safety precautions with your firearms, before he would put them in the car, or [249] did you take any precautions?

(Deposition of Virginia Wilkerson.)

"A. I had the shells taken out of the guns before they were put into the car.

"Q. Was that your general practice?

"A. Yes.

"Q. Your boy? "A. Yes.

"Q. What was the general practice of Mr. Houston?"

Mr. Clausen: To which we will object, if the court please, on the ground no foundation has been laid and it would be irrelevant in this matter. We are not concerned with something that happened up in Oregon. We are concerned with what happened on February 22, 1954.

Mr. Angell: The same statement, the objection was waived to the form. It is a proper question and answer. No objection is made as to what her practice was. When Mr. Houston's practice comes in, he gets up and objects.

The Court: The objection will be overruled.

Mr. Angell: (Reading.)

"Q. What was the general practice of Mr. Houston?

"A. He didn't do it."

"Mr. Cooper: I believe that's all."

Mr. Clausen: I will proceed. This is redirect examination. Now I will ask. (Reading.) [250]

"Redirect Examination by Mr. Clausen:

"Q. Mr. Cooper just asked you the basis for this feeling of hostility. Isn't it true that the cause of part of that feeling is your friendship with the Houston family? "A. No.

(Deposition of Virginia Wilkerson.)

“Q. Would you prefer to find——”

Mr. Clausen: This question was not answered. Then Mr. Cooper interrupted.

“Mr. Cooper: Just a minute. Were you present when the man died?”

Mr. Angell: Just a minute. I ask the other question be read.

Mr. Clausen: I will read the question. There is no answer to it.

“Q. Would you prefer to find that the Plaintiff should recover in this case, Mrs. Charlotte Houston?” There is no answer to that, your Honor. Then Mr. Cooper—. The reason for it is that Mr. Cooper has interrupted and the words follow there:

“Mr. Cooper: Just a minute. Were you present when the man died? “A. No.

“Q. You know nothing about those facts?

“A. It is a personal feeling with me.” [251]

Mr. Clausen: Now, the next question I withdraw, your Honor.

Mr. Angell: Just a minute. Your Honor, he asked this question.

Mr. Clausen: I didn't ask it.

Mr. Angell: He asked it on redirect, and now he is going to withdraw the question.

Mr. Clausen: It is an improper——

Mr. Angell: I ask that the deposition be read and the ruling be made after it is read. The question was asked. If it is improper, it is his question.

The Court: He is entitled to a record. Proceed.

(Deposition of Virginia Wilkerson.)

Mr. Clausen: Oh, yes, I understand. I say, I was going to state my point, your Honor. The next question is in my opinion objectionable, no matter who asked it, and it happens to have been asked by my own son, and therefore I at this time—the question is this:

“Q. In other words, in your opinion he didn’t commit suicide?”

And then there is an answer to it. I am objecting to the answer on the same ground that was objected to before, namely, that of course calls for an opinion and conclusion of the witness, and being an improper question it doesn’t matter who might have asked the question at the taking of the deposition. Now we are appearing before your Honor in the capacity of [252] attempting to find this very question. Therefore it is wrong, and therefore I object.

Mr. Angell: This is the first time we ever heard counsel asking a question and then got the answer he didn’t like and so he objects to the question that he should never have asked.

Mr. Clausen: I wasn’t ever there.

Mr. Angell: I don’t care whether you were there or not. Your son was there and he was representing this defendant. And counsel is nothing but a representative of the client. There is nothing personal about it at all. This attorney for this insurance company, the defendant here, asked this question. There was no objection by counsel for the plaintiff. He went on a fishing expedition, your Honor, and he got just exactly what counsel usually get when

(Deposition of Virginia Wilkerson.)

they go on a fishing expedition; they got what they weren't looking for, and now he is asking this court to strike out the answer. I will admit that the question of whether a thing is suicidal or not a suicide is a question for this court. But a person may have an opinion as to whether someone might know whether—might be that kind of a person who did or did not. It is in no way binding on this court. The court will determine that question when the evidence is all in. I submit that this question should be read into the record and the answer given, and then if there is any objection to that, let the objection be made at that [253] point. But this thing of reading only what you want to out of your own deposition——

The Court: Well, he has read it.

Mr. Angell: He hasn't read the answer.

The Court: Read the answer.

Mr. Clausen: (Reading.)

"A. He wasn't the kind of person to do it." Which I say, your Honor, is the very question—. The question itself says: "in your opinion." Clearly the question and the answer are improper and it wouldn't make any difference—. In other words, the court, your Honor, is not called upon—when I voice what I see is error, no matter where I find error and call it to the attention of the court, the court by reason of the relationship of the tongue or inexperience of counsel is not called upon to perpetuate error, and therefore I say that since it is error that we should object, we do object and ask the answer be stricken.

(Deposition of Virginia Wilkerson.)

Mr. Angell: You ask what her opinion is. Her opinion is not error. And now having gotten himself in that box, counsel went forward, extricated himself, and I think the next few questions and answers, if they are given, they will be much more enlightening to the court than this argument, and I will ask that the questions and answers be read as questioned and answered in the record.

Mr. Clausen: The next few questions and answers are [254] merely on whether she was a psychiatrist or not. But this specific question is this: "in your opinion," and then I asked—then he asked her opinion as to the matter to be decided by this court. We say that is objectionable, your Honor. We urge the objection.

The Court: The court is prepared to rule. The objection will be sustained.

Mr. Clausen: Then the next question is line 13:

(Reading.)

"Q. However, you are not a psychiatrist?

"A. No.

"Q. And have you ever made any study of suicides? "A. No.

"Q. In fact, ——"

(Counsel rereading deposition.)

"Q. However, you are not a psychiatrist?

"A. No.

"Q. And have you ever made any study of suicides? "A. No. [255]

"Q. In fact, you have no personal knowledge

(Deposition of Virginia Wilkerson.)

whatsoever of the method or manner in which Mr. Houston died? "A. No.

"Q. On this San Francisco visit you were referring to in January, 1954, did Mr. Houston on that occasion have anything to drink? "A. Yes.

"Q. What.

"A. I believe it was a vodka collins.

The Court: What's that?

Mr. Clausen: Vodka, a Russian drink Judge—your Honor.

The Court: Proceed.

Mr. Clausen: (Reading.)

"Q. That was at lunch? "A. No.

"Q. Did Mr. Houston ever complain of having headaches? "A. No.

"Q. I believe you testified that he had a cure for everything. Do you recall what these pills, etc. were, or what they were for?

"A. No. Penicillin for colds, etc.

"Q. Would you say that he was overly conscious of [256] his state of health?

"A. (Hesitates) Yes.

"Q. Now, with respect to this Rotary Club operation, that is a charity, is it not? "A. Yes.

"Q. Over the years as you observed Mr. Houston, would you say that he was the type to be very much interested in social work? "A. Yes.

"Q. Now, Mr. Cooper read to you the allegation in the answer with respect to the misrepresentation. You, as I remember, testified that you would describe Mr. Houston as a——"

(Deposition of Virginia Wilkerson.)

Mr. Clausen: Now, this answer, your Honor, is one which was objected to before and when objected to before your Honor sustained the objection. I will read the question:

“Q. Now, Mr. Cooper read to you the allegations in the answer with respect to misrepresentations. You, as I remember, testified that you would describe Mr. Houston as a ‘social’ drinker and an ‘occasional’ drinker. By social, you of course have reference only — can only have reference — to the times when you observed him, is that correct?”

Your Honor, we say there again the same objection we urged this morning, namely, that what counsel, Mr. Cooper, [257] did, to take the allegations of the Answer, transform into a question, and asked the witness her opinion of it, so that again is being perpetuated.

Mr. Angell: Counsel asks these questions. He gets answers he doesn’t like. Then he objects to them here in court. He is not making any objection up there. Remember, these are his own questions to which he is objecting.

The Court: The objection will have to be sustained. It may go out.

Mr. Clausen: Now, the next one is just a follow-along of the one your Honor sustained an objection to, so we withdraw that so your Honor may— So the record may show exactly what I am talking about, I will read it:

“Q. All those times were social times. Is that correct?”

(Deposition of Virginia Wilkerson.)

Then the next question is again one of the objectionable ones because the very word "Occasional" is used again there in quotes, again lifting it from the allegation of the answer. So we withdraw that.

Line 21: (Reading)

"Q. But, as a matter of fact, it is true, is it not, that when Mr. Houston was here in Lakeview that he was accustomed to having large amounts to drink per day?" [258]

Mr. Angell: We object to the withdrawal of that and ask for the court's ruling on it, for the record.

The Court: Read it:

Mr. Angell: And may we also, in order to not interfere with you—I would also like to ask that the deposition be marked in evidence and given an exhibit number.

The Court: It will be admitted and marked. What is the exhibit number?

The Clerk: Plaintiff's Exhibit 4 admitted and filed in evidence.

(Thereupon, the Deposition of Virginia Wilkerson, taken by the Defendants, on October 26, 1955, was received in evidence and marked Plaintiff's Exhibit 4.)

Mr. Clausen: The request right now before the Court is that I read the question to which I object:

"Q. When you said he was an 'occasional' drinker, you meant to say that he would drink on occasions, on social occasions. Isn't that correct?"

To which we object, again, your Honor, that it is

(Deposition of Virginia Wilkerson.)

just a follow up of the basic question as to which your Honor sustained an objection.

The Court: Let the question and answer stand. The objection will be overruled.

Mr. Angell: The answer is "Yes."

Mr. Clausen: Reading. [259]

"Q. But, as a matter of fact, it is true, is it not, that when Mr. Houston was here in Lakeview that he was accustomed to having large amounts to drink per day? "A. As a social function.

"Q. Day after day, isn't that correct?

"A. He had a drink every day.

"Q. Do you know his drinking habits in San Francisco? "A. No.

"Q. Do you know whether Mr. Houston suffered spells of insomnia? "A. No.

"Q. You don't know? "A. (Shakes head)

"Q. What were Mr. Houston's habits with respect to eating here in Lakeview? Did he have three meals a day? "A. Yes. Probably more.

"Q. Probably more? "A. (Nods head)

"Q. You mean four or five meals a day?

"A. Yes. He would always have something before he went to bed.

"Q. Have you ever observed Mr. Houston oppressed? "A. No.

"Q. Would you say that he was always in an [260] exhilarated mood? "A. Yes.

Mr. Angell: To complete the record: "I think that is all."

And then there is:

(Deposition of Virginia Wilkerson.)

“Recross Examination by Mr. Cooper:

“Q. Going back to the drink that you said Mr. Houston had in San Francisco—I am referring, and I think you are, too, and correct me if I am mistaken—to the day you and your father visited his office. Is that right? “A. Right.

“Q. Do you mean to give the impression that that drink was had in the office or en route home or some public establishment?

“A. In some public establishment.

“Q. Not in the office? “A. No.

“Q. Did he offer a drink to you in the office, or to your father? “A. No.

“Q. Now, then, coming down to the scope of Mr. Houston’s remedies, I want to explore that a little bit further. I understand from your testimony that he had, or thought he had, ulcers. Is that right?

“A. No. I don’t believe that ulcers was ever mentioned except laughingly.

“Q. But your father was bothered over the years? Is that right? “A. Yes.

“Q. And he offered your father some free medical advice on the subject. Is that right?

“A. I suppose.

“Q. Did you say that the gentleman carried remedies for any other particular medical difficulty that a person might have, or did he even carry a remedy for the ulcers?

“A. He was carrying vitamins, pills, and penicillin.

“Q. He carried penicillin? “A. Yes.

(Deposition of Virginia Wilkerson.)

“Q. What was his reason for the penicillin?

“A. He had been sick or just gotten over a cold.

“Q. Was the gentleman susceptible to colds?

“A. I don't know.

“Q. Did you ever see him have a cold?

“A. Yes.

“Q. How many times would you say that situation had been? “A. Probably three times.

“Q. Did he carry any other kind of remedy on his person? [262]

“A. He just had pills. I don't know what they were for or why.

“Q. Where did he have them?

“A. In his little grip.

“Q. Did he carry them on his person as he went about? “A. Yes.

“Q. Would you call this a rattlesnake country up here? “A. Yes.

“Q. Did he carry any antidote for a rattlesnake bite? “A. Scotch.

“Q. We have ticks up here, do we not?

“A. Yes.

“Q. And sometimes they can be quite serious—I mean their bite? “A. Yes.

“Q. Did he have any preventative for that—any pill or serum or anything else, or did the ticks concern him very much? “A. Not that I know of.

“Q. You mentioned that he was interested in social work other than helping the Rotary junior livestock auction; that he was interested in social work over and [263] beyond this? “A. Yes.

(Deposition of Virginia Wilkerson.)

“Q. What other social activity did he support in this community either with his physical efforts or with his cash that you know of?

“A. None, other than he was interested in boys and helping them.

“Q. Is that what you meant by social work?

“A. Yes. He was interested in furthering children's education and things like that.

“Q. What do you base that statement on?

“A. He has talked to me on the subject of sending his nephews and Don Campbell, which he called his son, and helping them along as best he could.

“Q. Now, coming to this question of whether or not he was an ‘occasional’ or ‘non-occasional’ drinker. When he did take a drink and there were friends about, would his companions drink with him, or would he drink alone?

“A. Always with someone.

“Q. Coming to his eating habits, do you know whether or not during the course of the years that you knew Mr. Houston whether or not he was accustomed to going to any other part of the West and spending as much time in the outdoors as he did here at Lakeview?

“A. He liked to go to Denver. He enjoyed going [264] there.

“Q. That is a big city, isn't it?

“A. On pack trips out of there, and the Canadian Rockies. He liked to go up there.

“Q. But in his trips here to Lakeview, as I understand your testimony, over the 10 years you

(Deposition of Virginia Wilkerson.)

knew him, his outdoor activities in this community, at least, were pretty much restricted to association with your father and friends of your immediate family. Isn't that right? "A. Yes.

"Q. And you have acted as host upon many occasions to people coming to this community from San Francisco or Portland and other big cities, have you not? "A. Yes.

"Q. And you have taken a lot of them into the wide open spaces to hunt and fish with your father?

"A. Yes.

"Q. And you have had occasion to observe their eating habits? "A. Yes.

"Q. Because you helped prepare the food on many of those trips? "A. Yes.

"Q. Isn't it true that if you take a city businessman, as you have testified Mr. Houston is, and bring him [265] out in the wide open spaces and hunt and fish and hike, isn't it true that that will stimulate the appetite of that person? "A. Yes.

"Q. That they will eat more than they would back at home in their habitual type of life.

"A. I would myself. I can't answer for Mr. Houston.

"Q. I am talking about people who have come in here that eat quite a bit, and have a tendency to eat more than three times a day. "A. Yes.

"Q. Were you subpoenaed here today, Mrs. Wilkerson? "A. Yes.

"Mr. Cooper: I have no further questions.

"Mr. Clausen: Did you ever see Mr. Houston

(Deposition of Virginia Wilkerson.)

wear a coon-skin cap in Lakeview? “A. No.

“Mr. Clausen: That is all.”

Mr. Clausen: We will recall Mr. Wainwright, your Honor.

JAMES H. WAINWRIGHT
previously sworn, recalled.

Redirect Examination

Mr. Clausen: Q. Mr. Wainwright—

I believe the foundation for this testimony was laid yesterday but counsel objected that at that time there had been no evidence of any drinking, and therefore I asked the [266] court's permission to withdraw the witness and to recall him when that testimony had been adduced.

At this time, your Honor, I merely am going to proceed with some of the questions that I was going to ask yesterday.

The Court: Do I understand then that all the testimony with relation to drink is in the record?

Mr. Clausen: At this time, your Honor, yes, your Honor.

The Court: Do you expect to call more witnesses in that respect?

Mr. Clausen: No, your Honor.

The Court: Proceed.

Mr. Clausen: Q. With regard to your position with the company and your duties, you testified to that, yesterday, Mr. Wainwright, the duties and the experience—

(Testimony of James H. Wainwright.)

I am thinking of this, your Honor, as I am asking the question, your Honor asked me whether all the evidence is in. I don't know what the letter is going to say that is going to be produced, and I don't know what the — I had also reserved, your Honor, the right to call the two policemen when I got their records which were put in yesterday, but I don't think any of those involve any drinking.

The Court: All right.

Mr. Clausen: Q. Mr. Wainwright, in connection with your position with the company and your experience, I asked you the nature of your duties, and you testified yesterday, I [267] believe, you testified regarding this file and the application with which we are concerned, is that correct? A. Yes.

Q. And are you familiar with the file and the application in this case? A. I am.

Q. And in connection with the underwriting of the particular policy that we are concerned with here, did the company follow its usual practice?

A. It did.

Q. And did the company rely upon the representations and the statements contained in the application? A. It did.

Q. And induced by that, did the company on November 3, 1953, or whenever it was, issue the policy? A. Yes.

Q. And did the company have any knowledge at that time of the drinking habits of——

Mr. Angell: Just a minute——

(Testimony of James H. Wainwright.)

Q. (Continuing) —Mr. Houston as disclosed now by the evidence in this case?

Mr. Angell: Just a minute. Are you through with the question.

Mr. Clausen: Yes, I am now.

Mr. Angell: All right. I object to it on the ground [268] that it is obviously a corporation which is quite inanimate, couldn't know anything except that of its officers. How this witness could tell what other people in the company knew or didn't know is beyond comprehension. So I submit the question is unintelligible, couldn't be answered by this witness because he couldn't know of his own knowledge. If he asked the witness whether he knew if Mr. Houston took any drinks as indicated by the record, I think it would be a legitimate question.

Mr. Clausen: It is the only way a corporation can testify, your Honor, through its agents, and I am asking the agent of the corporation. I say, I am asking the agent of the corporation the question, as to which this man is the most qualified to answer in the corporation.

The Court: What is the question again?

Mr. Clausen: Whether the company knew of these drinking habits when it issued its policy.

The Court: I take it, it follows that they did.

Mr. Clausen: That's right.

Mr. Angell: I don't know how they could. The knowledge of the corporation would be the knowledge of its officers, and how this man would know——

(Testimony of James H. Wainwright.)

The Court: Objection sustained. Let it go out.

Mr. Clausen: Q. And did you yourself at any time have any knowledge of the drinking habits of Mr. Houston as disclosed [269] by the evidence in this case? A. Not until after his death.

Q. And you have been sitting through the trial of this case, have you? A. Yes.

Q. Did any officer or member or person in the defendant's employ to your knowledge have knowledge of the drinking habits of Mr. Houston until after he passed away? A. No.

Q. And when, to your knowledge, was that information obtained and acquired?

A. It first came to the company's attention on the investigation made following Mr. Houston's death. [270]

Q. All right. And if the company had had that information, in the light of your experience and practice, with the company, would the company have issued its policy of insurance?

A. It wouldn't.

Mr. Angell: Just a minute. May I make my objection. I object as incompetent, irrevelant and immaterial, calling for the conclusion of this witness, asking for opinion testimony, which opinion testimony is not admissible. The witness was asked the question whether the company relied on it. I think that is a proper—upon the statements in the application—proper question to ask. It follows as a matter of law anyway. To ask whether they would have issued the policy if they had known what is here is

(Testimony of James H. Wainwright.)

totally objectionable because it assumes the very question to be determined by this court, and that is whether, as the evidence produced here as to the drinking habits of Mr. Houston were anything other than stated in that application.

The Court: Submitted?

Mr. Clausen: No. May I just state this, your Honor, Mr. Angell misconceives my question. I am not asking the witness to speculate or give his opinion. What I am doing is asking the witness of his own knowledge and considering as he knows the practice of the company, in the light of those facts would the company, had it known these drinking habits, have issued the policy. [271]

Mr. Angell: Same objection. It is just as objectionable as the first and that is speculating as to whether a man would or would not have entered into a contract had he known something that he claims now exists at the time he entered into the contract. I submit, your Honor, that it is subject to every objection humanly possible. Could you expect any answer out of the mouth of this witness that now, after the person is dead and after they have had in their possession for several months the application stating that this man did take occasional drinks, he was a social drinker, that he didn't use to excess—they had every opportunity to find out how much drinking he did take, they knew they were not issuing it to the president of the W.C.T.U., and they do nothing but they wait until the man dies and became liable on their policy and they ask

(Testimony of James H. Wainwright.)

a witness on the witness stand: If you had known the man had taken these few drinks that he took over all these years, would you have issued the policy? Answer: No. What answer could you have—what answer could you expect? I submit that the question is wholly objectionable.

The Court: Matter submitted?

Mr. Clausen: Submit the question.

The Court: The objection will be sustained.

Mr. Clausen: Q. What is the company practice—what was the company practice at the time this policy was issued, Mr. Wainwright, with regard to an unfavorable personal history [272] of drinking habits?

Mr. Angell: That is objected to on the grounds it calls for the conclusion of the witness.

The Court: Objection sustained.

Mr. Clausen: All right. You may step down.

We rest, your Honor, except in respect of the matters that I have observed.

(Witness excused.)

Mr. Angell: May we have a recess at this time?

(Short recess taken.)

Mr. Angell: At this time I wish to put into evidence as Plaintiff's exhibit next in order, as 5, first, proof of claim, dated the 16th day of April, 1954, on the form, Claimant's Statement form of Canada Life Assurance Company, and showing apparently receipt in the Canada Life Assurance Company on May 4, 1954, and signed by Charlotte S. Houston.

There is no question made, is there, that that was filed with the Canada Life Assurance Company?

Mr. Clausen: No. I pointed out before—I thought I made it clear, your Honor, there is no necessity for any of these papers going in, because we don't raise any question about proof of loss from a technical standpoint. We urge our two defenses that I have named. The reason also why, your Honor, these should not go in, in my opinion, is because with these papers that evidently were sent in—prepared and sent [273] in to the Company, there were several—or were at least one document here that is improper—I mean so far as this case is concerned—it would be the Coroner's verdict. We are not raising any question about proof of loss, and for that reason, your Honor, in view of the pleadings here, why—

Mr. Angell: We will take the stipulation that the proof of loss was duly filed and no objection was made to that proof of loss, other than those stated in the two separate defenses in the answer, namely, suicide and—

Mr. Clausen: That's right.

Mr. Angell: I want to refer—for the record—and misrepresentation in the application.

All right. Then let the record show that I have returned to you your Proof of Loss form.

(Discussion between counsel.)

Mr. Angell: I would like to offer this in evidence, if I may, and that the Certificate of Death, your Honor—certified—and the reason I am offering this in here—it is the Certificate of Death—I

imagine the Coroner filed this—and it is dated the 22nd day of—the date of death shown, February 22, 1954, and the physician's or the Coroner's certification, it was certified by Bernard D. Bungarz, the Coroner, and it was certified on March 29, 1954.

Mr. Clausen: You are offering that document?

Mr. Angell: I want to give the date of the Inquest [274] here because I believe——

Mr. Clausen: Let's stay with one document. If you are offering the Certificate of Death, we object to that, your Honor, on the ground that it would not be proper evidence, no point in having it in the case. We concede in the answer the man died on February 22, 1954. Now, this apparently would be an attempt, your Honor, indirectly to get before the Court or put in evidence matter which might appear on here. I don't know—I haven't read it through, so——

Mr. Angell: May I finish my offer now?

The Court: Finish your offer. Let him finish his offer so he can get a record.

Mr. Angell: As I say, the date of this Certificate of Death is March 29, 1954; and the next document I will offer——

Mr. Clausen: Well, he is——

Mr. Angell: ——will be the Verdict of the Coroner's Jury, which is dated on the same day, March 29, 1954.

Mr. Clausen: Same objection, your Honor. He only offers that for evidence, which would not be proper and certainly is irrelevant, wholly irrelevant,

as far as this court is concerned. In other words, a recorded verdict of a jury who may for various reasons have found various things at a different time than your Honor may hear this evidence and with different evidence before the jury.

Mr. Angell: May I answer that? [275]

Mr. Clausen: He is encompassing two things there, your Honor. He has got in his hand one paper and he says he is offering another two.

Mr. Angell: I am going to offer one. I will first offer, your Honor, as Plaintiff's exhibit next in order, No. 5, this Certificate of Death, the certified copy of it, showing death due to "external violence, undetermined," and ask that it be accepted into evidence.

Mr. Clausen: May I ask, through the Court, his purpose of offering that?

Mr. Angell: The purpose is to show what the Certificate of Death shows, and it is **my opinion** that it is admissible in evidence.

Mr. Clausen: Your Honor, what he is trying to do, obviously, from what he just now answered, is to try to put in evidence something that is on a piece of paper that I can't cross examine. There is no point in having it. The man died. The certificate merely certifies to that, which is clear and which is not in dispute in this case.

The Court: Well, then, how——

Mr. Clausen: So I object.

The Court: ——how are you prejudiced by it, if that be true?

Mr. Clausen: Well, for the reason, your Honor,

that some inference might unfavorably be drawn of some language [276] here. For example, he has made reference himself to a word "undetermined."

The Court: The objection will be overruled; let it go into evidence.

(Thereupon Certificate of Death received in evidence and marked Plaintiff's Exhibit No. 5.)

Mr. Angell: I will offer in evidence the verdict of Coroner's Jury, dated the same day as Plaintiff's Exhibit No. 5, namely, the death certificate—that was March 29, 1954,—showing the result of the Coroner's Jury determination: "This jury is unable to decide from the evidence whether this is suicidal or accidental." And ask that it be marked in evidence next in order.

Mr. Clausen: Would you pause just a moment so that I may—. In the first place, I move to strike what counsel has stated and I object certainly to the offer, your Honor, on the grounds that this Court is not bound by what any coroner's jury may have found. We don't know what went into it. I have no basis of cross examining the piece of paper. It would be very, in my opinion, erroneous. Counsel would be leading the Court, in my opinion, your Honor, into serious error to ask your Honor to receive in evidence, for any reason whatsoever, what a coroner's jury may have found. It can't be offered fairly or sincerely to state that the coroner held an inquest; it can't be offered for any other reason, your Honor, than an [277] attempt to try to have this court led into agreeing with some coroner's jury. In other words, what he is doing is to try to

offer that paper to prove what the paper says. He is not offering it——

The Court: What does the paper say?

Mr. Clausen: Just what he stated.

The Court: What?

Mr. Clausen: “Undetermined death.” Undetermined death.

The Court: Well, what do you spell out of that? Are you prejudiced by that?

Mr. Clausen: Yes, we are, your Honor.

The Court: In what respect?

Mr. Clausen: Because in the verdict here — I want to use the exact words—it doesn’t say “undetermined death” on there. The words “undetermined death” were on the other document to which I objected, but it relates the inability of this particular jury, for reasons which we don’t know anything about, being unable to decide from the evidence.

The Court: Well, if that be true, how are you prejudiced legally in any fashion?

Mr. Clausen: Well, I wouldn’t be prejudiced——

The Court: Let it be admitted and marked.

Mr. Clausen: Your Honor intercepted my statement. I was about to say, and I was never so serious as in what I am talking about, I would not be prejudiced in the eyes and the [278] minds of a court that itself would not pay any attention to this. Then if that is true—in other words, if, as I can assume, that the Court would not pay any attention to it, then I ask the Court why then admit it in evidence?

Mr. Angell: Maybe I can give some light on this.

I would like to. Fortunately, your Honor, I am not treading on new ground, and when those illustrious forebears of ours who appeared before this court and the other courts of California had this question up before them long years ago the same arguments were made and the thing came to final rest in the adjudicated cases. I will say that the cases hold that the testimony of the coroner's jury is not admissible before the court in a case of this kind to determine death but that the coroner's verdict is, and the case—I will cite you two—this is the oldest—and there's any number of them—*Walther vs. Mutual Life Insurance Company*, 65 California 417—they even refused to pay in those days—and there is a series of cases from that which flow——

Mr. Clausen: What is the citation?

Mr. Angell: *Walther vs. Mutual Life Insurance Company*, 65 California 417. But there's plenty of them later. That just takes you back how long it is and shows the basis for the rule, and obviously the reason for it is that it is not to bind this court—this court is going to make its own determination and not the jury over there. The evidence [279] produced before that jury may not have been the evidence produced in this court, and by either side——

The Court: I am going to allow the testimony in subject to motion to strike, and over your objection.

(Verdict of Coroner's Jury received in evidence and marked Plaintiff's Exhibit No. 6.)

The Court: Give counsel an opportunity to examine those authorities that you have.

Mr. Clausen: May I say——

The Court: He may be able to persuade me on my ruling.

Mr. Clausen: May I say, your Honor, of course, that my objection included the objection of hearsay. Your Honor says over my motion to strike. May I make the motion to strike at any time, your Honor? May I make the motion in the briefs that may be submitted following the trial?

The Court: You better get a record on it, whatever it may be, whatever you have in mind. I have made a ruling. This is subject to your motion to strike.

Mr. Clausen: Yes, your Honor.

The Court: Now, you can examine the authorities that he has cited.

Mr. Clausen: All right. I see.

The Court: I will give you an opportunity to change my view on this matter.

Mr. Clausen: Yes. [280]

The Court: More than that I cannot do, that I am able to say to you at this time.

Mr. Clausen: All right, your Honor.

(Witness excused.)

Mr. Angell: Mrs. Houston, will you take the witness stand?

CHARLOTTE H. CLAYTON

the plaintiff, called as a witness in her own behalf; sworn.

The Court: Your name, please?

A. Charlotte H. Clayton.

(Testimony of Charlotte H. Clayton.)

The Court: Where do you reside?

A. 1082 Miller Avenue.

The Court: Berkeley?

A. Berkeley.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. Now, Mrs. Clayton, these gentlemen back here want to hear, I want to hear, and I am not so easy in hearing as I used to be; if you will just direct your voice all the way out here and then the Court will be able to hear you, and just think all the time you are either talking to me or someone beyond me, and then the reporter will be able to get you, and hold your voice up, if you can.

A. All right.

Q. And it will be very helpful if we just step along here. [281] Your name is Mrs. Clayton, Charlotte Clayton, at the present time, is it not?

A. That is true.

Q. And when were you married to Mr. Clayton?

A. July 9, 1955.

Q. And prior to that you were the widow of——

Mr. Clausen: What was that date?

A. July 9, 1955.

Mr. Angell: Q. And prior to that date you were the widow of William Houston, the deceased, that is the subject of the litigation here, the insurance policy on his life, is that correct? A. I was.

Q. How long were you married to Mr. Houston?

A. Twenty-five and a half years.

(Testimony of Charlotte H. Clayton.)

Q. Where did you reside at the time of the occurrence here, the death of Mr. Houston?

A. 1082 Miller Avenue, Berkeley.

Q. Had you any children?

A. I have two daughters.

Q. Would you state their names and ages, for the record?

A. Charlotte Houston Gustafson, 26, and Ann Houston Hanscom, 22.

Q. Both children are married?

A. They are both married, yes. [282]

Q. Where does Charlotte live?

A. Charlotte lives in Berkeley.

Q. Where does Ann live?

A. Ann is going the end of the week to San Diego. Her husband is in the Navy.

Q. He is a commissioned officer in the Navy?

A. Yes, an ensign in the Navy.

Q. Now, directing your attention to your life with Mr. Houston, your domestic life and social, Mrs. Houston. Will you briefly state whether it was a happy or unhappy marriage for you?

A. It was a very happy marriage.

Q. Was it a discordant or a very, very close-knitted, happy family?

A. It was a close-knitted, happy family.

Q. Was Mr. Houston fond of you?

A. Very.

Q. And did you or Mr. Houston ever have any marital trouble of any serious kind or nature?

A. We did not.

(Testimony of Charlotte H. Clayton.)

Q. Prior to Mr. Houston's death or immediately prior thereto, was there any act or circumstance in your social or marriage life, your domestic life, which you could state would have caused Mr. Houston to take his own life?

Mr. Clausen: I object to that, your Honor, as calling [283] for the conclusion of the witness. Certainly any act at all, at any time in their life, could cause that to happen, your Honor, would be too all-embracing, remote, speculative, and then calling for the conclusion.

Mr. Angell: I will withdraw that to save argument on it, your Honor.

The Court: Reframe it.

Mr. Angell: Q. Immediately prior to the death of Mr. Houston, on February 22, 1954, had you or Mr. Houston had any differences or any unpleasant words about anything whatsoever?

A. We had not.

Q. Would you describe to the Court in your own words, so that I won't be said to be leading you, what was Mr. Houston's disposition, appearance, as to whether he was unhappy, depressed, melancholy or whether he was pleasant and happy; will you just tell the Court in your own words—say, cover the week just prior to the date of his death?

Mr. Clausen: Well, your Honor, I object to that as ambiguous. I don't know what the question would mean. The witness to talk about a week before the death?

(Testimony of Charlotte H. Clayton.)

The Court: The objection will be overruled. She may answer.

A. We had a very happy weekend. I am not sure that I can remember what happened early in the week, but we had seen our two daughters; we had seen Charlotte Houston; we had dinner [284] with friends; we had gone to Ann's sorority house to a reception; we had been to lunch; we had a very happy time with our friends and with our children.

Mr. Angell: Q. Now let's go back. When was the date or party at your daughter's sorority?

A. The party at my daughter's sorority house was on Saturday night. That would have been February 20th.

Q. That was at the University of California?

A. At the University of California.

Q. What sorority does she belong to?

A. My daughter Ann, Alpha Chi Omega. And my daughter Charlotte and her husband, Roger, picked Mr. Houston and me up, and we went first to the Kappa Kappa Gamma house where Roger's sister had just been pledged. Then we went to the Alpha Chi house where my daughter was, of which my daughter was a member.

Q. That is, now — let's get these daughters straightened out.

A. I should say Ann and Charlotte.

Q. Which daughter was Alpha Chi Omega?

A. They both were, but Ann at that time was in the university and was a member. It was to Ann's reception that we went.

(Testimony of Charlotte H. Clayton.)

Q. It was Ann's reception that you were going to?
A. That's right. [285]

Q. What was that reception, what was the purpose of it, Mrs. Houston?

A. At the end of rush week the sororities have a reception to introduce their new pledges to their families and to their friends and to the boys on the campus, and families are invited, and we went to see what they did by way of rushing that year.

Q. You and Mr. Houston went?

A. We went with Charlotte and Roger.

Q. Did he seem to enjoy it?

A. Very much.

Q. Did he mingle among the folks there?

A. Yes.

Q. Did he meet the young ladies and their parents?
A. He did.

Q. And was pleasant?
A. Very pleasant.

Q. Did he seem downcast at any time then or moody?
A. Not at all.

Q. Or depressed?
A. Not at all.

Q. Melancholy?
A. Not at all.

Q. Did he act as he had usually, always acted on that occasion? [286]
A. The same.

Q. You saw no difference?

A. No difference.

Q. Then you went to an evening at some friends; was that the evening or the night before?

A. That was Sunday night.

Q. Sunday night. Where did you go that night?

(Testimony of Charlotte H. Clayton.)

A. That was the night we went to dinner with the Hanscoms.

Q. And the Hanscoms—will you just state for the record who the Hanscoms are.

A. The Hanscoms are friends of long standing. I think we had probably known them at that time about eight years. And at that time my daughter Ann was engaged to their son Ronald. She has since been married to him.

Q. What is Mr. Hanscom's occupation or profession?

A. Mr. Hanscom is a patent lawyer.

Q. He is a patent——

A. Attorney, I should say.

Q. Is Mr. Hanscom in the court room?

A. Mr. Hanscom is in the court.

Q. It is his son who is married to your daughter, Ann?

A. That is right.

Q. How long have they been married?

A. They were married June 25, 1955.

Q. At the time of Mr. Houston's death had the date for the [287] marriage been set?

A. Yes, it had been set.

Q. Did Mr. Houston seem pleased with his new son-in-law?

A. He was very pleased. He was very fond of Ronald, admired him.

Q. Was he happy at the thought of his daughter getting married?

A. I am sure he was.

Q. Did he ever express any feelings that he was regretful or was going to feel melancholy, or de-

(Testimony of Charlotte H. Clayton.)

pressed because she left.

A. He felt as I did, that——

Mr. Clausen: Object to that, your Honor, the voluntary statement.

A. Pardon me.

Mr. Clausen: And expressing the opinion of the witness.

The Court: It may go out.

A. We both felt——

Mr. Clausen: Same objection.

The Court: The objection is sustained, it is a voluntary statement.

Mr. Angell: Q. Did Mr. Houston state his feelings toward Ann getting married to Mr. Hanscom—or to Mr. Hanscom? A. Oh, yes.

Q. What did he say?

A. They were both very happy. [288]

Q. And Mr. Houston was happy about it?

A. They were both very happy.

Q. Did he go out with this young man who was about to marry Ann—in other words, did he go to social events with him? A. Oh, yes.

Q. They went hunting?

A. They went hunting, had gone fishing.

Q. Up to Southern Oregon?

A. He had been to our camp in Oregon the summer before.

Q. Let's take Charlotte, who is Charlotte's husband? A. Roger Gustafson.

Q. Roger Gustafson. They live in Berkeley, do they not? A. They do.

(Testimony of Charlotte H. Clayton.)

Q. Incidentally, the Hanscoms live in Berkeley, do they not? A. They do.

Q. They live near you?

A. They live the other side of the campus from me.

Q. You live at what address—lived at what address at the time of Mr. Houston's death?

A. 1082 Miller Avenue.

Q. And that is just above Clyde, is it not, in Northern Berkeley—North Berkeley Hills?

A. It is.

Q. Then Mr. Hanscom lives over on Domingo Avenue? [289] A. Domingo Avenue.

Q. Near the Berkeley Tennis Club, is it not?

A. Within two blocks.

Q. Within two blocks of the Claremont Hotel. Did Mr. Houston take trips with Roger Gustafson, Charlotte's husband?

A. Yes, they—Roger came to our camp two summers for his vacation, and he and Mr. Houston rode horseback almost every weekend. Mr. Houston had horses near Martinez.

Q. Had they been ridden—had they been riding the day before Mr. Houston's death?

A. No, they didn't ride that weekend.

Q. Do you know why?

A. No, I do not know why.

Q. Isn't it true that that day before Mr. Houston spent— A. That was Sunday, yes. [290]

Q. Sunday? A. Yes.

Q. —that he spent—. Well, what did he do the day before? You tell me.

(Testimony of Charlotte H. Clayton.)

A. My mother was visiting us, and my mother, my husband and I went to church in the morning. And after church Mr. Houston went out to Lafayette to make plans for his ranches in Oregon with his two partners, Mr. Wilks and Mr. Taylor.

Q. What is Mr. Taylor's first name?

A. Mr. Houston always called him Ev. I believe his name is Sam.

Q. Do you know his profession or occupation?

A. He is a lawyer.

Q. And with offices here in San Francisco?

A. Yes. He was attorney, I think, for New Zealand.

Q. He was the attorney for New Zealand?

A. I think.

Q. Life Insurance Company. And Mr. Taylor was the Taylor of the firm of Thornton and Taylor, isn't that right?

A. That's right.

Q. With offices on California Street in San Francisco?

A. That's right.

Q. And who is Mr. Wilks, what is his first name?

A. Gilbert Wilks.

Q. What is his business or profession? [291]

A. He is head of a stevedoring company in San Francisco.

Q. And, as I understand it now, on the Sunday before—that would be February 21—Mr. Houston went out there and spent part or a good deal of that day with Mr. Taylor and Mr. Wilks, is that right?

A. He had lunch there. He brought us home after church and went on to Lafayette and had lunch with

(Testimony of Charlotte H. Clayton.)

Mr. Wilks, and he and Mr. Wilks and Mr. Taylor had this meeting during the afternoon to plan what they were going to do with the spring crops.

Q. And now you refer to the spring crops. It is true, is it not——

I am going to lead, counsel, where there can be no question about it——

Mr. Houston had an interest in farming properties in Southern Oregon, is that right?

A. That's right.

Q. Where were these properties?

A. They were near Lakeview.

Q. Both of them? A. Yes.

Q. There were two different properties, were there not? A. There were.

Q. One of them was known as the T-Bone Ranch? A. That's right. [292]

Q. That was a corporation, was it not?

A. Yes.

Q. And Mr. Wilks and Mr. Houston and Mr. Houston and Mr. Taylor owned all the stock of that corporation, is that right?

A. In T-Bone, yes.

Q. Yes. Now, then, was Mr. Utley a stockholder in T-Bone?

A. He was a stockholder in Southern Oregon, he and the other three men.

Q. Now then, they had a corporation also that operated the other piece of property and that was known as the Southern Oregon?

A. Southern Oregon Ranches.

(Testimony of Charlotte H. Clayton.)

Q. And the stockholders in that were Mr. Houston, Mr. Harry Utley, Mr. Wilks and Mr. Sam Taylor, is that right? A. That's right.

Q. What did the T-Bone Ranch grow, if anything?

A. I think they used it mostly for pasturage.

Q. That was a pasturage ranch?

A. I think so.

Q. What did the Southern Oregon Ranch produce? A. Wheat.

Q. Do you know whether Mr. Houston was planning, prior to his death and immediately prior to his death, to changing the method of farming up there or going into the cattle [293] business?

A. Yes, he was, and on Wednesday, I think, of that next week, the man who ran the ranches for them was coming to confer to make final arrangements.

Q. In other words, they had a superintendent in Southern Oregon, Lakeview, who ran these ranches, is that right? A. That's right.

Q. Do you know that gentleman's name?

A. I am afraid I can't recall it.

Q. And that gentleman was coming down here that week, is that correct? A. That is true.

Q. And the purpose of coming down was to determine whether they should purchase cattle or not to go on that ranch? A. Yes.

Q. What time did Mr. Houston return from Mr. Wilks' house out there at Orinda on that Sunday?

(Testimony of Charlotte H. Clayton.)

A. Just in time to get ready to go to the Hanscoms.

Q. When Mr. Wilks returned from there did you notice any change in Mr. Houston's attitude or disposition or did he indicate in any way that anything had happened out at that meeting?

A. No. I think it had been a successful meeting. There was no difficulty.

Q. Did he appear melancholy, depressed? [294]

A. Not at all.

Q. In any way? A. Not at all.

Q. Before I forget it, did Mr. Houston ever at any time in any way express to you the thought of self-destruction or whether he would——

A. Absolutely not.

Q. Now, on that night, Sunday, you say he had come back just in time to go to the social occasion and that, I think you testified, was at the home of Mr. and Mrs. LeRoy Hanscom, is that true?

A. That's right.

Q. At 66 Domingo Road in Berkeley. You went on to that dinner, did you?

A. We went on to that dinner.

Q. Who was present at that dinner?

A. My daughter and her fiancée, Ronald, Mr. and Mrs. Hanscom, my mother, Mrs. Spaulding, Mr. Houston and I.

Q. And what time did you say you arrived there?

A. 6:30, I think.

Q. And would you state, as near as you can recall, when you left there?

(Testimony of Charlotte H. Clayton.)

A. After the dinner party?

Q. Yes.

A. I imagine between 11:00 and 11:30. I'm not positive. [295]

Q. Between 11:00 and 11:30? A. Yes.

Q. It might be a little earlier?

A. Well, it might have been. I'm not sure.

Q. Would you describe to the Court, just quickly in general terms, the nature of that party, whether drinks were served there?

A. Yes, we had drinks before dinner.

Q. And can you recall how many Mr. Houston had?

A. I don't think that any of us had more than two.

Q. And were those served——

A. That is what we usually have at the Hanscoms.

Q. And those were before dinner or after dinner? A. Before dinner.

Q. Were there any drinks served after dinner at all? A. No.

Q. What happened at that party, was there anything there that did upset—anything that occurred that upset Mr. Houston or in any way disturbed him?

A. Not at all. It was a very happy, congenial family type group. We didn't play bridge, we just sat and talked after dinner.

Q. It was just a family evening, gathered around

(Testimony of Charlotte H. Clayton.)

a dinner table, and then in the living room after the dinner?

A. That is true. [296]

Q. At which you just talked about things in general, is that right? A. That is all.

Q. Now, when you went home after that dinner, did you go directly home? A. We did.

Q. And did you then retire? A. We did.

Q. Did you and Mr. Houston sleep in the same room? A. We did.

Q. Did Mr. Houston in any way that evening, after you went home, did he make any statement about feeling ill, depressed or melancholy at all?

A. Not at all.

Q. Was he congenial, in a congenial, jovial mood? A. Very.

Q. And seemed perfectly happy? A. Yes.

Q. Did Mr. Houston indicate any thought of suicide? A. Absolutely not.

Q. What time did you arise, you personally, get up on the morning of February 22, 1955?

A. I think Ann and I got up about 9:30.

Q. About 9:30? A. Yes. [297]

Q. Did you have your breakfast when you got up? A. Yes.

Q. Did you go about your household duties?

A. Yes.

Q. Did Mr. Houston get up then?

A. No, he didn't.

Q. When did Mr. Houston get up?

A. He got up after I went upstairs and woke

(Testimony of Charlotte H. Clayton.)

him and asked him if he would like to come downstairs and have lunch with us.

Q. In other words, Mr. Houston slept right straight through until you awakened him, is that correct? A. That is true.

Q. And what time was that, that you awakened him, Mr. Houston?

A. It must have been between 1:00 and 1:30.

Q. When Mr. Houston woke up, did he appear to be gloomy or melancholic at all? A. Not at all.

Q. Did he seem to be congenial and happy?

A. He did.

Q. What did you say to Mr. Houston when you went up there and woke him up, and what did he say to you, as near as you can recall?

A. I asked him if he would like to get up and eat with us. [298] And he said yes, he would. And I said, "Would you like to have me bring you a glass of tomato juice?" And he said yes, he would.

And I went downstairs to get the tomato juice.

Q. And did you bring it back up to him?

A. I brought it back and put it on the top of the stairway, the floor of the upstairs hall—you can reach through the bannister—and I put it up there.

Q. Did Mr. Houston take that glass of orange juice—well, tomato juice—and drink it?

A. He did.

Q. And then you went back in the kitchen, as I understand it, did you? After you put that there, you went back in the kitchen? A. Yes.

Q. What were you doing in the kitchen?

(Testimony of Charlotte H. Clayton.)

A. I was cooking.

Q. You were cooking? A. Cooking.

Q. You were cooking breakfast?

A. No, it was breakfast for Mr. Houston, it was lunch for Ann and me.

Q. Brunch?

A. Brunch. I think my mother hadn't had breakfast either.

Q. You have a patio, have you not, right off your kitchen? [299]

A. I have a patio off the kitchen.

Q. Did you eat in that patio—were you eating in that patio that morning?

A. We had planned to and Ann and I had been out there that morning and planned to, and decided it was too cold.

Q. How does it come you rose or Mr. Houston slept so late on Sunday? Is there any reason for that at all? A. This was Monday.

Q. I mean, on that Monday.

A. On Monday. He always slept late unless we went to church early; he slept late on Saturdays—so did I.

Q. Was there anything unusual about Mr. Houston sleeping until 1:00 or 1:30? A. Nothing.

Q. Now, that is the last time you saw Mr. Houston, when you took the tomato juice up, put it on the stairs, is that correct?

A. No. I saw him in the kitchen later when he came downstairs.

Q. Oh, that's right. Then will you tell us what

(Testimony of Charlotte H. Clayton.)

happened immediately after that; did Mr. Houston come downstairs?

A. He came downstairs.

Q. Will you just indicate here on this exhibit, if you will, Mrs. Houston—referring to Plaintiff's Exhibit 1—which, by the way, for the record, your Honor, I would like [300] to now offer in evidence. It is only in for identification.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 1 admitted and filed in evidence.

(Thereupon chart, previously marked for identification, was received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Angell: Q. Call your attention to Plaintiff's Exhibit 1. Would you indicate with the pointer where the breakfast room is? It will not show on that diagram. That—it will be above something on that diagram.

A. The breakfast room? We don't have a breakfast room. The kitchen is above this room (indicating).

Q. The kitchen is above what is called on that diagram, Plaintiff's 1, "Servants' Quarters", is that correct? A. Servants' room.

Q. Now then, can you indicate on that diagram where the stairs that Mr. Houston came down from upstairs, the bedroom——

A. Oh, that's a little difficult. It must be over these steps (indicating).

Q. Mr. Houston came down the stairs, and in

(Testimony of Charlotte H. Clayton.)

Q. Then Mr. Houston, as I recall it, passed right through the kitchen where you were and down the stairway, is that correct?

A. I didn't see him go down the stairs, no. I went into the dining room.

Q. You went out in the dining room?

A. The dining door is here (indicating).

Q. Did you notice how Mr. Houston was dressed when he went through the kitchen?

A. He was wearing pajamas and a robe and slippers.

Q. Pajamas, robe and slippers? A. Yes.

Q. What kind of slippers were they, were they mules or were they——

A. They were leather slippers.

Q. They were leather slippers? [304]

A. Leather slippers.

Q. Did the bathrobe have a belt on it?

A. It did have.

Q. And did you observe how that belt was tied that particular morning?

A. Well, I don't know that I observed it that particular morning. He always tied it very loosely.

Mr. Clausen: Object to what it might have been on other mornings, Your Honor. Suggest that go out as nonresponsive to the question.

The Court: Objection is overruled. Let it stand.

Mr. Angell: Q. Did you notice whether Mr. Houston had any gun in his hand or anything in his hands at all?

A. No. I know he didn't have.

(Testimony of Charlotte H. Clayton.)

Q. He did not have? A. He did not have.

Q. Now, you said you then went into the dining room and came—.Did you return into the kitchen? A. Yes. And—may I explain?

Q. Yes.

A. We had planned eating in the patio, which is here (indicating)—there is a door coming out of the front hallway, and I decided it was a little too cool. My mother was there—

Mr. Clausen: Your Honor, object to the [305] volunteer statement of the witness.

The Witness: I'm sorry.

Mr. Clausen: I would suggest that counsel proceed by question and answer.

The Court: It may go out.

Mr. Angell: Q. You then went into the kitchen, is that correct? A. That's correct.

Q. Now—by the way, I want to ask you, was Mr. Houston wearing any glasses that morning?

A. No, he was not.

Q. Was it Mr. Houston's custom to wear glasses? A. Yes.

Q. At all times? A. Yes.

Q. Both in the office working, reading, and also when he was just on the street, is that correct?

A. He wore tri-focals.

Q. He wore tri-focals and wore them all the time? Is that right? A. Right.

Q. But he had no glasses on this morning when he went down into the basement or when you saw him going through the kitchen, is that right?

(Testimony of Charlotte H. Clayton.)

A. Yes. [306]

Q. When is the next time you saw Mr. Houston? A. I didn't see him again alive.

Q. The next time you saw him, Mr. Houston was dead, is that correct?

A. (Witness nods head.)

Q. What occurred there that led you to go into the basement? You were the one that went down and found Mr. Houston, were you not?

A. I was.

Q. How did you come to go down there into the basement at that time? What caused you to go down? A. I heard a heavy thud.

Q. You heard a thud? A. Very heavy thud.

Q. And then did you go down alone or did Ann go with you? A. I went down alone.

Q. And when you went down was the door going into the basement, the part of the basement where Mr. Houston's body was found, was that door open or closed? A. It was open.

Q. It was open. And you saw Mr. Houston lying there on the floor, is that correct?

A. I couldn't see him until I got down the steps.

Q. You got down the steps, you went into the room then, did you? [307] A. Yes.

Q. Then you saw Mr. Houston lying there, did you not? A. Yes.

Q. Officer Pine has placed on Plaintiff's Exhibit 1 a P-1 indicating the position of Mr. Houston's body when he first saw it. I will ask you if you

(Testimony of Charlotte H. Clayton.)

recollect if that is where Mr. Houston was lying when you saw it?

A. I think he was lying here (indicating). His head was almost up to the washing machine.

Q. Will you take that green chalk and will you just place an X in there where you think Mr. Houston's body was lying, and will you mark that with you initials, C. C., and 1.

(Witness indicating CC-1.)

The Court: We will take the adjournment, if it is agreeable to both sides. 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. November 9, 1955.) [308]

The Clerk: Houston vs. The Canada Life Assurance Company, further trial.

Mr. Angell: Ready, your Honor.

Mr. Clausen: Ready.

CHARLOTTE H. CLAYTON

the plaintiff, recalled as a witness in her own behalf; previously sworn.

Direct Examination—(Resumed)

Mr. Angell: Q. Mrs. Clayton, you were at the board showing the physical features of the basement last night when we closed and I believe that you had just put a green circle on a mark that you had made on Plaintiff's Exhibit 1 showing what you believe to be was the location of Mr. Houston's

(Testimony of Charlotte H. Clayton.)

body when you found it on the afternoon of February 22nd. Is that correct?

A. That's correct.

Q. Will you step back here to the board with the pointer. Now, this map is drawn to scale, your Honor, and for the purpose of the record, it shows that the scale is three-quarters of an inch to one foot, and attached to Plaintiff's Exhibit 1 is a scale ruler of Acme Legal Service, which is the same ruler for this particular map of three-quarters of an inch to one foot, and I will ask that [311] this same ruler be marked part of this Plaintiff's Exhibit 1.

And, for the record, I want the record to show that the hole cut in the floor shown in Plaintiff's Exhibit 1, and, from this scale ruler, to the point where Mrs. Clayton says she first saw Mr. Houston's body, is 22 feet.

Now, Mrs. Clayton, what was this basement used for?

A. This end, the basement was used for storing, for laundry purposes.

Q. When you say "this end" you are pointing to the south end as shown by Plaintiff's Exhibit 1, is that correct?

A. That's correct.

Q. This?

A. This end, for storage.

Q. The storage, was that the north end of the basement? Is that right?

A. That's correct.

Q. Was that basement divided up into different levels?

A. Yes, it was.

No. 15102

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Court of Appeals
for the Ninth Circuit

THE CANADA LIFE ASSURANCE COM-
PANY, a Corporation, Appellant,

vs.

CHARLOTTE S. HOUSTON, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 361 to 700, inclusive)

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

JUL 25 1956

PAUL P. O'BRIEN, CLERK



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(Testimony of Charlotte H. Clayton.)

Q. Now, will you state for the record what those levels were, as near as you can recall?

A. This, from there to ceiling is approximately six feet eleven—

Q. Now, just a minute, so we get some marks. Well, you take this and do the marking instead of me. Now show the part that is six feet eleven. Will you draw a line across [312] the map where the six foot eleven—you might just circle the six foot eleven. A. (Witness designating.)

Q. Now will you put a green line around the outer boundaries, like around where the six foot level is? A. (Witness designating.)

Mr. Angell: I will mark that C-2.

Q. Now, the green outline on the map, Plaintiff's Exhibit 1, for the purpose of the record, shows that portion of the basement that was approximately how high? How high did you say?

A. From floor to ceiling?

Q. Yes.

A. Approximately six feet eleven.

Q. All right. Now, where would the next level be?

A. The next level is in this corner of the room.

Q. And you are pointing to the northwest portion of Plaintiff's Exhibit 1, is that right?

A. Yes.

Q. How high was that?

A. Approximately five foot eleven from floor to ceiling.

(Testimony of Charlotte H. Clayton.)

Q. Will you put that in red—outline the portion there that was five foot eleven.

A. (Witness designating.)

Q. Mark that C-3. [313]

A. (Witness designating.)

Q. Was there another level in the basement?

A. This is a higher level.

Q. You are pointing now to the northeast portion of the basement? A. That is correct.

Q. And that was how high?

A. Four feet eleven, approximately.

Q. Use that orange colored crayon and mark that portion which you say is about three and a half—

A. Four feet eleven (witness designating.)

Q. Referring to that portion of the basement which you said was six feet eleven, will you just generally describe what was in that portion of the basement?

A. This portion of the basement I used as a laundry; the washing machine I had here, water heater, tables for laundry, then the ironer, and then all around this edge were stored boxes, sewing machine here, two tables here.

Q. On Plaintiff's Exhibit 1 there are shown objects, sewing machine, boxes, garden tools and tables, paper boxes, and so on, stored on top, cabinet, ironer, table, table, water heater, and washing machine on this Exhibit 1.

Is that the way the objects shown on there were the afternoon of February 22nd when Mr. Houston

(Testimony of Charlotte H. Clayton.)

met his death? A. Approximately, yes. [314]

Q. And it shows the ironer in about the center of that six foot eleven space, is that correct?

A. Yes.

Q. That is on this Plaintiff's Exhibit 1?

A. Yes.

Q. Now, sometime subsequent or on or about March 24th, Mr. Bradford and Dr. Kirk came to the premises there, did they not, to make an inspection, an examination of these premises?

A. They did.

Mr. Clausen: Object to that as leading and suggestive.

Mr. Angell: It is just preliminary. We will show they did and I believe you know they did.

Q. And at the time that Dr. Kirk and Mr. Bradford were there, were the objects in the basement and that portion of the basement as shown by Plaintiff's Exhibit 1 in the same position they were on the afternoon on February 22nd at the time Mr. Houston met his death? A. They were.

Q. Referring to that portion of the basement shown on Plaintiff's Exhibit 1 as the northwest part and which you have shown as five feet eleven by your marking C-3, will you state what that portion of the basement was used for on February 22nd, 1954?

A. These two portions of the basement [315] were almost solid with storage, with stores of things.

Q. You are pointing now to the——

(Testimony of Charlotte H. Clayton.)

A. This area and this area (indicating).

Q. The area marked C-3 on there and C——

A. C-4.

Q. ——C-4 on Plaintiff's Exhibit 1, is that correct? A. That's correct.

Q. And was that the way that portion of the basement had been for some time prior to Mr. Houston's death? A. Yes.

Q. And that's the way it continued until after Dr. Kirk and Mr. Bradford's visit?

A. That is true.

Q. Will you just describe for the record what you had stored in that—take, first, the part there you have marked C-3 and state what was stored in there.

A. This is a sofa, and stored in front of the sofa were my patio chairs, with hand chairs along in here——

Q. Just a moment; so that the record will show that, there is marked on this exhibit the word "Sofa" in the area marked C-3. Is that where the Sofa was then? A. Yes.

Q. On February 22nd. Then in front of that sofa you say that you had your patio chairs?

A. Yes. My outdoor furniture. [316]

Q. All right.

A. The sofa was also piled with bamboo blinds and various and sundry things, on top of the sofa.

This is a cedar chest, a very large cedar chest, over which were thrown sleeping bags, air mattresses, and so forth.

(Testimony of Charlotte H. Clayton.)

Q. Now, that's the word "Chest." You might save time if you will say that where the word "Chest" appears in C-3 area the following articles were there—. It will save me correcting the record—correcting it for the record here—that is, if that won't confuse you.

A. Where it says "Bedding, etc.," were stored three or four beds, springs, mattresses, bedsteads, bed, both ends, with head and foot, mattresses and bedboards.

Q. Did those bedboards project out into the area shown on Plaintiff's Exhibit 1 in what would be the open area here in the area marked C-3?

A. They extended across here.

Mr. Angell: And the witness has pointed that they extended across from where the word "Chest" appears in this C-3 area.

A. Yes. This is a permanent bookcase, built-in bookcase.

Q. Pointing to what has previously been marked P-3, and which on this exhibit says "Bookcase."

A. That's correct.

Q. Is that correct? [317] A. Yes.

Q. In the extreme northwest corner there appears, on Plaintiff's Exhibit 1, the word "Broom and sweep."

A. There is a sweeper back there.

Q. What else?

A. And a broom—I think.

Q. Now, did Mr. Houston keep any of his sporting gear or equipment in that area?

(Testimony of Charlotte H. Clayton.)

A. He kept all of it in that area.

Q. And referring to that particular corner where it says "Brooms and sweeper," what in the way of sporting equipment did Mr. Houston keep in there?

A. He kept his guns in this corner.

Q. Pardon me—I have stopped you——

A. You want to know the rest of it?

Q. Answer the question. A. All right.

Q. He kept his guns in that part which is called on Plaintiff's Exhibit 1 "Brooms and sweeper," is that correct? A. Yes.

Q. Now, how long had Mr. Houston kept his guns in there?

A. He always kept them there.

Q. And was that for some time prior to his death on February 22nd?

A. I think as long as we lived there, which is two years. [318]

Q. And up to the date that he was killed in that basement, is that right? A. Yes.

Q. And how were the guns stored in there?

A. Standing up.

Q. They were standing on end?

A. Yes. (Designating.)

Q. And were they in any case? A. No.

Q. The butt rested on the floor and the barrel rested on the side of the wall? A. True.

Q. And were those guns by themselves in that area or were they scattered in among the other things that were there, such as the brooms and

(Testimony of Charlotte H. Clayton.)

the sweeper, which are shown on Plaintiff's Exhibit 1? A. That's correct.

Q. They were in among the other material, is that right? A. That's true.

Q. In other words, Mr. Houston had no gun case? A. No, sir.

Q. In any place in the house, is that correct?

A. That is true.

Q. Now, did Mr. Houston store any other of his sporting gear in the basement as shown by Plaintiff's Exhibit 1? [319] A. Yes, he did.

Q. Will you just state what and where and will you call it by the numbers that you have given, as either C-3 or C-4, whatever it is?

A. His saddles were hanging along here.

Q. You are pointing along here to a long——

A. Along—this platform is raised a foot.

Q. In other words, C-4 is a raised platform?

A. It is a raised platform.

Q. Were they stored on the C-4 area?

A. They were hanging from a rafter that goes through here.

Q. And that you show as along the western side of the C-4 area, is that correct?

A. That's correct.

Q. And how many saddles did Mr. Houston have? A. Three.

Q. Three? A. Yes.

Q. Did he have any other equipment, fishing equipment or sporting equipment, in that area?

A. He had all of his equipment in this area; he

(Testimony of Charlotte H. Clayton.)

had fishing poles, there were fishing boots also hanging from this rafter that the saddles hung from.

Q. Sleeping bags?

A. Saddle blankets, saddle bags, saddle bags, sleeping bags [320] —saddle blankets is what I am trying to say. Sleeping bags, air mattresses.

Q. And they were stored——

A. Hunting clothes, jackets, boots, riding boots.

Q. Now, Mrs. Clayton, I will show you a photograph which has the legend on it: "General view of area of shooting," and——

Mr. Clausen: May I ask counsel when it was taken?

Mr. Angell: If you will give me a chance, I will identify the photograph, Mr. Clausen.

Q. ——and ask you if that picture, that view, is familiar to you. A. Yes.

Mr. Clausen: Just a moment. We object to that on the ground the witness is looking at the photograph, and the critical question that I would like to know is when the photograph was taken. I ask counsel.

Mr. Angell: This is preliminary.

Mr. Clausen: No foundation is laid.

Mr. Angell: I can't be establishing everything all in one question.

The Court: You will have to lay the foundation.

Mr. Angell: I am trying to identify it.

The Court: You will have to lay the foundation for it.

(Testimony of Charlotte H. Clayton.)

Mr. Angell: I am going to lay the foundation.

The Court: You better do that at this time.

Mr. Angell: I am identifying it, your Honor.

Q. Have you seen that picture before?

A. I have.

Q. When was that taken, do you know?

A. I think Mr. Bradford took it.

Mr. Clausen: Well, now, just a moment—the witness says that somebody else took it. She didn't even answer the question. The question was when the photograph was taken. Evidently the witness doesn't know. I asked counsel the question, but he hasn't told me. So therefore, your Honor, I object on the ground that there is no foundation.

Mr. Angell: Well, I can't lay it with just one question, Mr. Clausen.

Q. Does that photograph in your hand show the articles that were in that corner the date of Mr. Houston's death?

Mr. Clausen: Same objection. Your Honor, the ground that the witness is being asked about, a photograph, there is no foundation laid as to who took the photograph or when the photograph was taken.

Mr. Angell: Your Honor——

Mr. Clausen: And counsel knows merely asking the witness to guess as to whether the photograph might show the conditions as of the date of the incident—. I think it is only fair that the party who took the photograph and the date be [322] made known to the court.

(Testimony of Charlotte H. Clayton.)

Mr. Angell: If your Honor please, the rule stated by Mr. Clausen has so long since been abandoned that it is surprising to hear it even mentioned in court any longer. The cases state you can show a witness a photograph to illustrate their testimony; if they have the knowledge, they can show that photograph shows what I saw on a given day, and they do not have to have taken the photograph, they do not have to have been present when the photograph was taken, nor need that photograph even have been made on that date or at any other particular date if the witness identifies the articles in that photograph and as correctly showing a situation as is depicted in that picture. In other words, it is just exactly as Mr. Clausen introduced this manikin yesterday, purely by way of illustration of what his witness had taken out of the coroner's testimony or the inquest testimony.

The Court: What serious objection is there to laying the foundation for this picture?

Mr. Clausen: (To counsel:) He is asking you a question.

Mr. Angell: Well, only that the witness didn't take the picture.

The Court: Well, who did?

Mr. Angell: A Mr. Bradford took the picture, and he will be here as a witness. [323]

The Court: With that understanding, I will allow it. If it is not connected up, it will go out.

Mr. Clausen: Yes, your Honor.

The Court: Let the record note the objection.

(Testimony of Charlotte H. Clayton.)

Mr. Angell: We will offer it for identification, then, only, your Honor.

The Court: Very well.

Mr. Angell: I will put it in for identification.

The Court: Let it be admitted and marked.

Mr. Angell: That will be Plaintiff's Exhibit 7 for identification.

The Court: It will be admitted and marked.

The Clerk: Plaintiff's Exhibit 7 marked for identification.

(Photograph "General view of area of shooting" marked for identification Plaintiff's Exhibit No. 7.)

Mr. Angell: Q. Now, I show you Plaintiff's Exhibit No. 7 for identification, Mrs. Clayton. Do you recognize the objects shown in that picture?

A. Yes, sir.

Q. And will you just state what that picture shows?

A. It is a picture of this area C-3 showing the bookcase, the bedding, what is marked here as "Bedding", the chest, the end of the sofa, and the patio furniture along here, sleeping bags. [324]

Q. Is that the way that area appeared on the date of Mr. Houston's death, on February 22, 1954?

A. Yes.

Mr. Clausen: Just a moment. Your Honor, we will object to that as calling for the conclusion of the witness, showing the witness a picture and asking whether that appeared that way to the witness as of a certain day.

(Testimony of Charlotte H. Clayton.)

The Court: Do you wish a ruling?

Mr. Angell: All I am asking is what the witness sees in that picture is what she saw on February 22nd.

The Court: I will allow it. Objection overruled.

A. I answered "Yes."

Mr. Angell: Q. Now Mrs. Clayton, do you know the distance between the outer edge of the bookcase and the space in Plaintiff's Exhibit 1 where it is shown as a passageway, a clear area in there, which is the access area in Plaintiff's Exhibit 1 back to where it says "Brooms and sweeper," do you know approximately how wide that passageway was on February 22nd, 1954?

A. Approximately eighteen inches.

Q. Did Mr. Houston frequently go into the basement? A. Very.

Q. Was it unusual for Mr. Houston to get up in the morning and go down into the basement?

A. Not at all unusual. He kept all of his [325] sporting equipment down there.

Q. And sometimes when you called Mr. Houston to meals or breakfast or dinner, did he go down into the basement after you had called him?

A. Very often.

Q. And would you ever go down there and find out what he was doing down there?

A. Sometimes. If I insisted he come to meals promptly.

Q. And would you go down to see what he was doing? A. Yes.

(Testimony of Charlotte H. Clayton.)

Q. And what would you find him doing down there?

A. Oiling boots or saddles or cleaning guns, fixing fishing equipment, tackle.

Q. On holidays and weekends when Mr. Houston was home, was it his habit to spend a great deal of time down there in the basement?

A. It was.

Q. With his sporting equipment?

A. That is true.

Q. And working on it?

A. Working on it.

Q. On February 22, 1954, there were found in the storage room, which storage room is marked "Storage Room" on Plaintiff's Exhibit 1, there were found two guns in that area, as shown by the testimony here. Did Mr. Houston as a matter [326] of practice keep guns in that area?

A. Not as a matter of practice.

Q. And had you ever seen any guns in that storeroom prior to the date February 22, 1954?

A. No, sir.

Q. What was that area used for primarily?

A. That is a storage area. My married daughter, I always called her, her closet—her wedding presents were stored in it. My daughter Ann has done a lot of art work and she kept her art material in there.

Q. That door, does it have a lock and key?

A. It has a lock and key.

(Testimony of Charlotte H. Clayton.)

Q. What would you say the size of that was, do you happen to know?

A. I don't know. But I should say four and a half, five feet square.

Q. Approximately four and a half, five feet square. Prior to the date and time of Mr. Houston's death did you go into that basement frequently?

A. Very frequently. It was my laundry.

Q. Your laundry. You would go in there several times a week, is that right? A. Yes, sir.

Q. And just prior to the time of Mr. Houston's death, when you went in there on any occasions did you see Mr. [327] Houston's guns or any of his guns back in the storage? A. Yes, sir.

Q. The storage place, which is marked C-3 and where it says "Brooms and sweeper" on Plaintiff's Exhibit 1? A. Yes, sir.

Q. Now, referring to Defendant's Exhibit C and the application for the insurance policy which is here the subject of this suit, there appears on that exhibit in the lower left-hand corner as a witness to the application filed with The Canada Life Assurance Company the name Robert C. Utley. Do you know Robert C. Utley?

A. Yes; I have know him for a long time.

Q. And who is Robert C. Utley?

A. He is the son of Harry Utley who is my husband's very close friend in Lakeview.

Q. And business associate?

A. Business associate and friend.

(Testimony of Charlotte H. Clayton.)

Q. And is Mr. Harry Utley the father of Mr. Robert C. Utley?

A. He is the father of Robert C. Utley.

Q. He is also the father of Mrs. Wilkerson, is that right?

A. That's true.

Q. And did Mr. Houston know Robert Utley?

A. Yes, he did.

Q. And how long had he know him?

Mr. Clausen: Just a moment. We will [328] object to that on the ground it is asking this witness what another person may know, certainly calling for speculation, your Honor.

The Court: If she knows she may answer. Objection overruled.

A. I knew him also.

Mr. Angell: Q. Yes.

A. My husband knew him. We saw him frequently when we went up at our camp near Lakeview.

Q. What period of time would that be?

A. We owned the camp for five years prior to Mr. Houston's death. And he had known Mr. Bob Utley—as a matter of fact, when Bob Utley was in the army Mrs. Bob Utley worked for my husband's company as a secretary or a stenographer.

Q. Do you know Mr. Robert Utley's occupation or business at the time that he witnessed this application for this policy?

A. He sold life insurance.

Q. And for what company?

A. The Canada Life.

(Testimony of Charlotte H. Clayton.)

Q. Do you know whether or not Mr. Houston took this policy out through Mr. Utley?

A. I know that he did.

Q. You know that he did? A. Yes.

Q. And Mr. Utley signed the application as a witness, your Honor, on the date that it bears, which is September 18, 1953. [329]

Did Mr. Robert Utley go hunting with Mr. Houston? A. I imagine he did, yes.

Q. Do you know whether he did or not?

A. I never saw him go hunting, no.

Q. Were Mr. Houston and you in the home of Mr. Harry Utley when Mr. Robert Utley was there? A. Frequently.

Q. Did you go to social events together?

A. We went to Harry Utley's, to dinner, with him.

Q. And can you think of any other social events that you went with Mr. Robert Utley, who was present, and Mr. Houston?

A. No, I can't. He has been at our cabin, at our camp.

Q. And how often has he been there?

A. I imagine that in the three or four weeks that I was there every summer I saw him three or four or five times.

Q. He would be present at social gatherings at your cabin at those times? A. That is true.

Q. Referring to Mr. Houston's health, do you know the condition of Mr. Houston's health at the time of his death or just prior thereto?

A. He was in very good health.

(Testimony of Charlotte H. Clayton.)

Q. Did he have any affliction which required him—or for which he did carry pills or——

A. He had a chronic sinusitis. [330]

Q. Did he take some pills or medicine for it?

A. He did.

Q. He carried those with him?

A. He also took vitamin pills.

Q. He took vitamins? A. That is true.

Q. How tall was Mr. Houston?

A. Six two and a half.

Q. And what weight at the time of his death?

A. 168, I imagine; maybe more. I am not sure.

Q. At any time prior to Mr. Houston's death had he ever complained to you of being ill or in bad health? A. No.

Q. Had he had any illnesses of a serious nature at any time, say immediately within the last two or three years prior to his death?

Mr. Clausen: Well, I object to that as being compound; there are two questions there in one.

Mr. Angell: I will withdraw it.

Mr. Clausen: All right.

Mr. Angell: Q. Had Mr. Houston had any serious illnesses within a year just prior to his death?

A. No.

Mr. Clausen: Object to that, if the court please, on the ground that it is asking this witness to speculate on what [331] another man may have had, not what another man stated but what another man may have had; unknown to this witness he may have had serious ills of which he may have said nothing.

(Testimony of Charlotte H. Clayton.)

The Court: The objection will be overruled. I will allow the question and answer to stand.

Mr. Angell: Q. What was your answer to that? I didn't hear it.

A. He did not have any serious illnesses.

Q. He had the usual run of colds, did he not?

A. Yes, colds.

Q. Flu? A. He had flu.

Q. Did Mr. Houston ever make any statement to you regarding his financial condition, as to whether it was good, bad or indifferent?

A. We discussed our financial condition rather often, I think, and I think that it was in—that it was a very good financial condition. We had nothing to worry about, is what I mean.

Q. Well, did Mr. Houston at any time ever say to you he was worried about his finances?

A. No, sir.

Mr. Angell: We have had prepared a financial statement by a certified public accountant showing Mr. Houston's financial condition at the date of his death. This I will [332] show to counsel and see if he will have any objection to its use. I will bring in the certified public accountant.

Mr. Clausen: I certainly do object to this and object to it on account of being irrelevant to the issues here so far as the tender of this evidence is concerned and no showing that Mr. Houston ever knew of this financial condition or that this reflex condition that Mr. Houston thought he had. There is no foundation for any of that.

(Testimony of Charlotte H. Clayton.)

Mr. Angell: Are you objecting to it on the ground that the man that made it is not here or are you objecting to it on the ground that it is inadmissible evidence?

Mr. Clausen: It is both, both inadmissible and—both inadmissible and no proper foundation.

Mr. Angell: Well, then, your Honor, I will ask at this time to mark this as Plaintiff's exhibit next in order for identification and then ask to be allowed to ask this witness questions concerning it, which are within her knowledge, and I will then produce the certified public accountant to identify the statement as having been prepared by him.

The Court: I will allow it.

(Financial statement marked for identification Plaintiff's Exhibit No. 8.)

Mr. Angell: I might say, your Honor, this exhibit as shown by the certification of the certified public accountant is prepared from public documents which are the inventories [133] of assets in the state proceedings of Mr. Houston, so they are a matter of public record.

Q. I will show you Plaintiff's Exhibit 8 for identification, Mrs. Clayton, and I will ask you to look that over carefully, and the assets there shown, and ask you if to the best of your knowledge that sets forth accurately the assets and liabilities of Mr. Houston and yourself on the date of Mr. Houston's death.

Mr. Clausen: I would object, your Honor, on the ground that there is no showing that this witness

(Testimony of Charlotte H. Clayton.)

knows—now, this is the first time I have seen this. What has apparently been done here, your Honor, is an attempt to estimate an asset and liability situation as of the date of death. For example, here are items which an accountant has picked out and set down, such as “Cash surrender values” and “Real estate,” and here’s a figure which is supposed to represent maybe market value, it may be sales value, who knows what.

Mr. Angell: I am going to produce the man who made it.

The Court: With the assurance that he produce the accountant, why, I will allow it.

Mr. Angell: You can examine him all you want as to where he got the figures.

Mr. Clausen: I might point further, your Honor, I think it is going far afield; I mean, I think it is too far afield from the immediate issue in the case.

Mr. Angell: The immediate issue is whether this man committed suicide or whether the death was by accident, and I think that everything that was in the mind of the man at the time of his death is pertinent to show his mental state as to whether he would have had any reason for committing an act of self-destruction.

The Court: For that limited purpose I will allow it.

Mr. Angell: I might say that in the case as put in by counsel it was tried in every way to show that this man was worried and in a depressive state.

Mr. Clausen: I understood the court ruled and I

(Testimony of Charlotte H. Clayton.)

have ceased talking, but I could answer counsel—I am not going to, your Honor.

The Court: Well, the jury is absent.

Mr. Angell: Q. Does the exhibit, Plaintiff's 8 for identification, which you hold in your hand, Mrs. Clayton, set forth the assets and liabilities as near as you can understand them to be?

A. Yes, sir.

Q. You have seen this accounting before, have you not? A. Yes, I have.

Q. You did file your accounting in Mr. Houston's estate?

A. Yes, I was his executrix.

Mr. Angell: For the record, solely, here, I wish to state that the record shows the current assets as of February [335] 22, 1954, to be \$133,336.70, and that the total liabilities were \$33,606.14, with a net worth of \$99,730.56.

Q. I am not sure that I have asked you this question and you answered it, so I am going to state it again—ask the question again: Will you state, as nearly as you can to—tell us what was Mr. Houston's nature. Was he ordinarily a happy sort of person or a gloomy, melancholy person?

A. He was a happy person.

Q. Would you characterize Mr. Houston as an extrovert? A. I would.

Q. Vigorous? A. Very, very.

Q. Dynamic? A. I would.

Q. And did Mr. Houston, as far as you observed, always enjoy the things that he was doing?

(Testimony of Charlotte H. Clayton.)

A. He loved life, he really did.

Q. Was he a sportsman? A. He was.

Q. And did he have any activities and sports other than in hunting and fishing?

A. In sports?

Q. Yes. A. Is folk dancing a sport?

Q. Well, some people might put it in the category of sports. [336] I was thinking of riding.

A. Oh, yes.

Q. Did Mr. Houston have any horses at the time of his death?

A. He owned four horses, yes.

Q. And where were those kept?

A. They were kept out in Martinez.

Q. And did he frequently go out there on weekends and ride?

A. Very often, went both Saturday and Sunday to ride.

Q. Would you and your daughters go with him?

A. Yes.

Q. Frequently? A. Frequently.

Q. Did Mr. Houston do any hunting other than just up in southern Oregon?

A. He had hunted in Colorado.

Q. Beg your pardon?

A. He had hunted in Colorado.

Q. And Mr. Houston was reared in Colorado, was he? A. He was reared in Colorado.

Q. And was he reared in the city or on a ranch?

A. He was reared in Steamboat Springs, Colorado, which is——

(Testimony of Charlotte H. Clayton.)

Q. What part of the country——

A. Mountain.

Q. Is that cattle country? [337]

A. Sheep.

Q. And Mr. Houston's boyhood, do you know whether he was around cattle and worked on cattle ranches?

A. Yes, he did, summers.

Q. Was Mr. Houston an accomplished man with a lasso?

A. Very.

Q. And in the handling of cattle and livestock?

A. Yes.

Q. Did he evidence or state any interest in those to you?

A. Yes. He was going to raise livestock on his ranches in Oregon.

Q. At the time of Mr. Houston's death did Mr. Houston make any statements to you about any activities he had to further his financial or business interests with respect to cattle or farming?

A. Yes, he was buying—he planned to buy cattle; I think he bought some, to put on his ranches in Oregon.

Q. Did he have any meeting set up that you know of at the time of his death for any day in that coming week with his business associates?

A. He did have. He met on Sunday with Mr. Wilks and Mr. Taylor, his partners, to plan ahead what they would tell their manager, their ranch manager, when he came down to town on Wednesday, what their plans would be.

(Testimony of Charlotte H. Clayton.)

Q. And the ranch manager was coming down that Wednesday [338] following that Monday?

A. He was.

Q. Following that Monday on which Mr. Houston met his death, is that correct? A. True.

Q. Referring to Mr. Houston's business activities, do you know whether or not Mr. Houston had been offered the presidency of any insurance company just some time shortly prior to his death?

A. He had been.

Q. You knew that from what source?

A. He told me.

Q. Do you know what company it was?

A. The Fire Association of Philadelphia.

Q. Did he make any statement to you as to whether he intended to take it and leave New Zealand or whether he didn't?

A. He told me that he would never want to go back to the east coast, that he planned to spend the rest of his time in the insurance business with the New Zealand on this—Pacific Coast.

Q. Did you and Mr. Houston have a fairly active social life? A. Yes, quite, I think.

Q. Did you give cocktail parties at your home?

A. No, we didn't give cocktail parties. We entertained guests at dinner. When we entertained it was that way. [339]

Q. Did you and Mr. Houston habitually attend cocktail parties?

A. I don't suppose we went to one a year.

Q. Did you belong to any neighborhood organi-

(Testimony of Charlotte H. Clayton.)

zations where they engaged in any sort of activity?

A. We belonged to a dancing club, square dancing, folk dancing, which met once a month at Hillside in Berkeley.

Q. Were you both quite active in that?

A. Yes, we enjoyed it tremendously.

Q. Right up to the time of Mr. Houston's death?

A. Yes.

Q. And where were those dances held?

A. At Hillside Club in Berkeley.

Q. Was there any drinking at those occasions?

A. No, sir.

Q. Now, Mrs. Clayton, referring to Mr. Houston's use and consumption of alcoholic beverages. Did Mr. Houston take a drink?

A. Yes, he did.

Q. Did you observe his drinking in your home or when you were out with him? A. I did.

Q. Would you just tell the court, in your own language, just what you observed with regard to Mr. Houston's drinking, and keeping it entirely within your own knowledge when he was [340] with you?

A. Mr. Houston and I sometimes had a drink before dinner, sometimes sherry or beer, maybe a highball. Often when we went out where we were entertained we didn't drink at all. We very seldom went to cocktail parties. I never in my life saw my husband intoxicated, unable to drive, unable to talk or to conduct himself as a gentleman—not once.

Q. How long were you married to Mr. Houston?

(Testimony of Charlotte H. Clayton.)

A. I was married to Mr. Houston twenty-five and a half years.

Q. At any time in those twenty-five and a half years did you ever have occasion to criticize or complain to Mr. Houston of his conduct, within the home or elsewhere, because of his drinking?

A. No, sir.

Q. And did you ever see Mr. Houston ever drink by himself? A. Never.

Q. Now referring, first, to your entire life with Mr. Houston as a wife, did you ever at any time during your entire life as a wife of Mr. Houston ever hear him state that he intended to or would take his life by his own hand? A. Never.

Q. Now, that period just before Mr. Houston's death on February 22, 1954, did Mr. Houston make any statement to you of any kind, that he intended to take his life? [341]

A. Absolutely not.

Q. Did he state anything to you as any reason which might cause him to take his life?

A. No, sir.

Q. Now, much has been said here as to his worrying about a report which he got out for his company each year, and referring to that report, did Mr. Houston discuss that report with you at all?

A. Oh, yes, he did.

Q. The report that he put in just before his death on February 22, 1954? A. He did.

Q. And what did he say about it?

A. He told me that it had to go back to the

(Testimony of Charlotte H. Clayton.)

printer's and that this extra page had to be put into it, and I think it all had to be re-signed.

Q. Did he appear to be depressed about that?

A. Not depressed; kind of mad, preoccupied and bothered.

Q. Did he state his reason why—was it because of a mistake made or that it had to be reprinted?

A. There was a deadline that had to be met, I think that was the trouble.

Q. And it had to go back to the printer to have a page done, is that right?

A. That's right. [342]

Q. In the days—let's take—or some period just prior to February 22, 1954, had Mr. Houston appeared any different around the home or any time you saw him than he had—than he did always?

A. No, sir.

Q. Did he seem any more depressed or morbid?

A. No, sir.

Q. Or melancholy? A. No.

Q. Did he seem happy and cheerful?

A. Yes.

Q. Now, the night before you were at the Hanscoms', as you have testified. Did he appear to be just as happy as usual and join in the conversation?

A. Yes.

Mr. Clausen: Your Honor, we have gone into this; it is repetitious. Object on the ground it's all asked and answered, many of these questions, this morning.

Mr. Angell: I think she has answered it.

(Testimony of Charlotte H. Clayton.)

Q. Now, are you familiar with the habits of Mr. Houston with respect to whether he kept his guns loaded around the house or did not keep them loaded? A. He kept them loaded.

Q. And did you see them or did he tell you they were loaded?

A. He told me they were loaded. [343]

Q. And what did he tell you about them being loaded?

A. He told me he always kept them loaded.

Q. Did he ever give you any admonition?

A. Oh, he told me to stay away from them, but he knew that I would.

Q. Did you of your own knowledge know when the guns that were in that space, shown on Plaintiff's Exhibit 1 as "Brooms and sweeper," do you know when the guns were in there, when they were brought to that place?

A. They were brought back with all of Mr. Houston's equipment from camp at the end of hunting season, approximately the first of November.

Q. As I recall your testimony, on the afternoon of February 22nd Mr. Houston came down from upstairs, he was in his bathrobe and slippers and he went through the kitchen and down the basement stairs and into the basement, is that correct, the lower portion of the house?

A. That is true.

Q. Was the door from the kitchen down the stairway to the basement open or closed?

A. It was open.

(Testimony of Charlotte H. Clayton.)

Q. When Mr. Houston went down that morning?

A. That door is always open.

Q. And just at the foot of those stairs, as shown on Plaintiff's Exhibit 1, is the furnace room, is that correct? [344]

A. That is true.

Q. And then, as shown on Plaintiff's Exhibit 1, to go into that storage room where the two other guns were found, you go through the furnace room and into that storage room, is that correct?

A. That is true.

Q. Is there anything about that door in that storage room which would have—you would have heard it open if it had opened?

A. It's a metal fire door.

Q. Yes.

A. It's heavy and it bangs and it has to be unlocked.

Q. It has to be unlocked?

A. There is no knob on it. It has to be unlocked in order for you to open it.

Q. Does it make any noise when it is pushed open? A. Yes.

Q. And it did on the morning of February 22nd, 1954?

Mr. Clausen: Object to that as leading and suggestive. This is his own witness.

The Court: Objection sustained. It may go out.

Mr. Angell: Q. Did you go in through that door frequently?

(Testimony of Charlotte H. Clayton.)

A. Not as frequently as I did the rest of the basement, no. [345]

Q. Did you from time to time go into it?

A. From time to time I went into it, yes.

Q. On those occasions, when you went in and out, did the door make any noise when it was opened and closed?

A. Yes, it does make a noise.

Q. On the morning of—or the afternoon of February 22, 1954, at the time Mr. Houston went through the kitchen down into the basement did you hear any noise of that door?

A. No, sir.

Q. Now, you went up to Oregon with Mr. Houston on numerous occasions, did you not?

A. Yes, sir.

Q. How long had you been up there?

A. Oh, four or five years.

Q. Where would you stay when you went up?

A. At our camp.

Q. And when you went up what would be the length of time you would stay—just generally?

A. Oh, three or four weeks.

Q. And it would be during the summer vacation? A. Yes.

Q. And would your daughters be with you?

A. My daughters and their friends, and the last time we went we had four young boys with us.

Q. And you all stayed at your cabin there?

A. Yes, sir.

Q. Did Mr. Houston—when he was up there did he usually dress differently than he did when he

(Testimony of Charlotte H. Clayton.)

was in the city or in his office? A. Yes, he did.

Q. What would he dress in?

A. Blue jeans, shirt, cowboy hat, cowboy boots.

Q. On those occasions did you observe any difference—any different demeanor on the part of Mr. Houston than when he was here?

A. Well, he was having lots of fun, jolly. He wasn't sitting behind a desk. He was having a vacation.

Q. And did you notice any difference as to the number of drinks he would take? A. No, sir.

Q. Or the times when he would take them?

A. No, sir.

Q. And did Mr. Houston go up there alone on many occasions, that you know of?

A. He almost always took somebody with him. I think he always did. I don't remember——

Q. When you were up there did you drive about the country? A. Yes, we did.

Q. Go out fishing, hunting?

A. That's right. [347]

Q. Did Mr. Houston do the driving, usually?

A. He always drove.

Q. After Mr. Houston's death did you discover or find any communication of any kind whatsoever?

A. No, sir.

Q. No notes? A. No, sir.

Q. No letters? A. No, sir.

Q. No nothing? A. No, sir.

Q. And there is one other question, referring to Plaintiff's Exhibit 1, on the morning or afternoon of February 22nd, at the time of Mr. Houston's

(Testimony of Charlotte H. Clayton.)

death, were there any clothes hanging in the basement?

A. That side of the basement was hung almost solid with clothes.

Q. And what were those clothes?

A. Laundry.

Q. Laundry? A. Laundry.

Q. In other words, you had been down there and washed and hung them there in the basement, is that right?

A. Yes. My daughter had been living on the campus for a week and she came home with a lot of dirty clothes. [348]

Mr. Angell: That is all.

The Court: Is that all from this witness?

Mr. Angell: That is all.

The Court: Take a recess.

(Short recess taken.)

Mr. Angell: May I ask one or two more questions about this map before you take Mrs. Clayton on cross? I wanted to ask about the lights in that basement.

Q. How many lights were in the basement?

A. There is one light.

Q. Will you take your green pencil and mark it and put C-5?

A. (Witness designating C-5.)

Q. Do you happen to know the candle power, the wattage of that light, what it was on February 22nd, at the time of Mr. Houston's death?

A. 100.

(Testimony of Charlotte H. Clayton.)

Q. 100 watts? A. Yes.

Q. Then there were windows in there?

A. These two windows.

Q. As shown on Plaintiff's Exhibit 1?

A. That's right.

Q. There is one other question. Are there any clotheslines in that basement?

A. Yes, there are clotheslines running (indicating). [349]

Q. Will you take the orange chalk and just draw a cross there, the clotheslines as they were on February 22nd?

A. There is a heavy rafter that runs through here. The clotheslines run across from this rafter to the rafter on the side.

Q. Just draw them in there. A. All right.

Q. Just put lines.

A. (Witness designating.)

Q. How many are there all told?

A. Eleven.

Q. On that day that Mr. Houston died there, those had clothes on them?

A. Yes, they did have.

Mr. Angell: All right.

Cross Examination

Mr. Clausen: Q. Mrs. Houston, you went down to the basement that morning after the shooting, you could see all right, couldn't you?

A. Yes, I could see.

Q. As a matter of fact, you testified this morn-

(Testimony of Charlotte H. Clayton.)

ing concerning objects that you saw, that you said that you saw then that you said were the same in the photograph, is that correct?

A. That's correct.

Q. I beg your pardon? [350]

A. That is true.

Q. In other words, you looked at a picture that counsel showed you of the Coroner in this particular area where the gun was found and you just told us this morning that those objects were in the same position on this afternoon of February 22nd, 1954, isn't that correct? A. Yes, sir.

Q. In other words, you could see that?

A. Yes.

Q. In addition to the light, your basement has windows that are indicated right here where I am pointing? A. That's true.

Q. Well, Mrs. Houston, you told us also this morning that you could not hear this door in which there were two other guns—there was a storage room where you said that two other guns were stored; do you recall that? A. That's right.

Q. You said you couldn't hear that door upstairs? A. I said I didn't hear it.

Q. No, as a matter of fact, you didn't even hear the shot that killed your husband, did you?

A. No, sir.

Q. I beg your pardon? A. I didn't.

Q. No. That was heard by your daughter and your mother? [351] A. That's true.

Q. Now, Mrs. Houston, you told us this morning

(Testimony of Charlotte H. Clayton.)

that Mr. Houston always kept his guns in this corner by the brooms and the sweeper, and later on you stated that he had two guns in a storage room. Would you mark, so there is no question about where that storage room is, Mrs. Houston—would you come to the board, please, and just put an “X”?

A. (Witness designating on map.) This is the storage room.

Q. I see. A. Here.

Q. Just put a mark there, with an “X”—put an “X” there where those guns were in that room.

A. (Witness designating.)

Q. All right. A. Shall I number it?

Q. Give it the next number, Mrs. Houston.

A. (Witness designating.)

Mr. Clausen: Thank you. It is marked C-7, for the record.

You may resume your seat.

Q. As a matter of fact, isn't it correct, Mrs. Houston, that you did not know where these guns were in the basement before the shooting?

A. Yes, I knew where they were kept.

Q. You didn't pay any attention to them, did you? [352]

A. Not to go and look at them, no, but I knew where they were.

Q. Well, isn't it correct they were kept anywhere in the basement, Mrs. Houston? A. No.

Q. Mrs. Clayton, rather?

A. Well, they were kept in that corner.

Q. Well, do you recall giving your deposition,

(Testimony of Charlotte H. Clayton.)

Mrs. Clayton, on May 31, 1955—and I am referring now to page 26, lines 13 to 17 (handing to witness).

Will you read that, please?

A. (Witness examining.) Yes, sir.

Q. On that occasion did you give this testimony——

Mr. Angell: Page number?

Mr. Clausen: 26, line 13 through 17:

“Q. Were they kept in any other place in the house?

“A. They were kept anywhere in the basement. I really don’t know. This one end of the basement I very seldom got into. The laundry was my end and an open space at the other end of the basement.”

Did you give that testimony? A. I did.

Q. And is it not a fact, Mrs. Houston—Mrs. Clayton, rather——. Well, I will ask you to read the testimony on page 27, line 6 over to page 28, line 1, please (handing witness). [353]

A. (Witness examining.)

Q. Did you give testimony on the taking of the deposition:

“Mr. Cathcart: Q. As far as you know, the guns were never kept in any other part of the house?

“A. On occasions they were kept upstairs. I think not in the—in this present house, however.

“Q. You don’t recall of ever having seen the guns in this present house in any other place than in the basement, is that correct?

“A. I don’t remember.

(Testimony of Charlotte H. Clayton.)

“Q. When was it that you acquired this present house? “A. Two and a half years.

“Q. And I may be repeating myself but how many guns did you see down there—the last time that you noticed the guns at all?

“A. I honestly didn’t notice guns because they were completely out of my department.

“Q. When you say you didn’t notice them, you didn’t notice how many except that there was one or more?

“A. I wouldn’t know and I wouldn’t know what kind of guns.”

Did you give that testimony?

A. I did. [354]

Q. Now when you told us this morning also about the guns being loaded, that was just an assumption on your part, wasn’t that correct?

A. My husband told me they were loaded.

Q. Well now, were all these guns your husband’s guns? A. I think they were his guns.

Q. And isn’t it correct, though, on occasion that he kept other people’s guns there? A. Yes.

Q. And isn’t it correct that he didn’t tell you he kept the guns of other people loaded?

A. I don’t—I didn’t ask him that.

Q. Well, he didn’t ever tell you that he kept all guns loaded then, did he, Mrs. Houston?

A. Yes, he did tell me that.

Q. Including guns of other people?

A. Well, he didn’t go into that. He didn’t make that.

(Testimony of Charlotte H. Clayton.)

Q. That is what I say, he didn't say that he kept all guns of any kind that he ever had in the house loaded, did he? A. Yes.

Q. Including those of other people?

A. What he said was: "I always kept my guns loaded."

Q. All right, now, Mrs.—I will refer you to the—I will ask you the question: Do you know from anything he said to you whether he always kept guns loaded, even those guns that [355] didn't belong to him?

A. He never said: No, I don't keep those that don't belong to me loaded. He didn't say that.

Q. He didn't tell you that? A. No, sir.

Q. Now, in point of truth, Mrs. Clayton, you actually of your own knowledge don't know where the gun was that did the firing there on this occasion, do you?

A. I know that there were guns in that corner of the basement.

Q. That is what I understand you said, but I say, you actually of your own knowledge don't know, specifically of your own knowledge, where that gun was exactly before the firing, do you?

A. No.

Q. Now, Mrs. Clayton, you testified this morning concerning a financial statement. Counsel handed you this. You told us this was correct. Now I am referring, and I will hand you the sheet—I am going to ask you about——

The Court: Exhibit what?

(Testimony of Charlotte H. Clayton.)

Mr. Clausen: Exhibit 8, Plaintiff's 8.

Q. You listed down there as liabilities as of this date, February 22, 1954, last year, "Sundry amounts payable"—you told us these were correct—\$475. What accounts were they?

A. They were the bills that were owing at the time of my [356] husband's death.

Q. Now then, you have "Notes and accrued interest payable, current installments \$3,481.74." What were they?

A. They were notes on the two ranches and there was a note to my husband's father.

Q. Well, isn't that the note that is set down here underneath, "Unsecured — M. Elliott Houston, \$9879.82"? A. Yes.

Q. Well, I am asking you concerning the figure of \$3481.74.

A. I don't know unless it was those three notes.

Q. All right. Now then, you have an item here of \$1000, "Stock subscription payable T-Bone Ranches, Inc." Is that one of these corporations that you referred to? A. Yes, sir.

Q. Now then, you have an item, "Liabilities" under "Liabilities and net worth"—there is a liability, "Notes and mortgage loan payable: The Canadian Bank of Commerce \$9903.33." Do you know what that was? A. Yes, sir.

Q. And do you know the—you said he talked his financial affairs over with you—do you know when that loan was started, how far back it was he first borrowed on his life insurance?

(Testimony of Charlotte H. Clayton.)

A. Yes. I imagine it must have been eight or nine years ago, I can't give you the date. [357]

Q. In other words, about eight or nine years before 1954 he had first pledged his life insurance policies against loans, correct?

A. Yes, sir.

Q. And by successive loans, isn't that correct, throughout the years from that point down to the time he died, he owed at the time he died, on these—secured by these life insurance policies—this sum of \$9903, isn't that right? A. Yes, sir.

Q. Do you recall how he was paying off this loan to the Canadian Bank of Commerce secured by these life insurance policies?

A. Yes, he was paying them off, paying it off.

Q. How was he doing that?

A. I can't tell you exactly.

Q. You don't know that? A. No.

Q. Do you know that he first borrowed in 1945 some \$8000?

A. I think that was probably when we bought our first house in Berkeley.

Q. And do you recall that at that time he borrowed \$6000 from the Canadian Bank of Commerce and at that time assigned to the bank life insurance policies? A. Yes, sir.

Q. Now, do you recall that in 1951 he had borrowed, after [358] paying off somewhat another loan, he borrowed \$3800 more? A. Yes.

Q. Raising the amount he owed to the Canadian Bank of Commerce to \$8000—some odd dollars?

(Testimony of Charlotte H. Clayton.)

A. Yes, sir.

Q. Do you recall that in June of 1951 he borrowed \$2300 more, raising his balance to some \$10,000?

A. I don't remember these dates, really. I can't swear that I remember on a certain date he did this.

Q. Mrs. Clayton, when you said you discussed your financial affairs often with Mr. Houston, did he discuss with you his repeated borrowings from the Canadian Bank of Commerce?

A. Yes, I knew what he owed to the Canadian Bank of Commerce.

Q. Is it your recollection that in 1951 he made two loans, successive loans, one for \$3800, one for \$2300?

A. Yes.

Q. Is it your recollection that in the year 1952, the following year, he borrowed \$2500 more?

A. Yes, I know that. I didn't know the date of it. I couldn't tell you dates.

Q. Is it your recollection that in that same year, 1952, in July, he borrowed \$1250 more?

A. Yes.

Q. And is it your recollection that in 1953, after the loan [359] had been reduced down, that he borrowed an additional \$2000 again, raising the balance then to \$10,900, odd, on his life insurance policies?

A. I knew that.

Q. And therefore at the time of his death he owed this \$9900 and some odd dollars referred to in your Plaintiff's Exhibit 8?

A. Yes.

(Testimony of Charlotte H. Clayton.)

Q. And then in addition to that he owed on a loan for the purchase of the home in which you were living \$12,347? A. Yes, sir.

Q. In addition to that he owed relatives—rather, M. Elliott Houston, an unsecured loan of \$9879?

A. Yes, sir. Oh, these current installments are the notes and accrued interest payable.

Q. Beg your pardon?

A. Current installments \$3481.74. That's the same figure as the notes and accrued interest payable that you asked me about.

Q. This \$3481 would be a current liability, isn't that right? That's what it is designated by the accountant. A. Yes, sir.

Q. Isn't that correct? A. Yes, sir.

Q. In other words, at the time he died he then at that [360] moment had a current liability—in other words, a then current liability, according to this, of \$3481. Is that right? A. Yes.

Q. Now, my question, before your recollection is refreshed, is what were they, do you know?

A. Aren't they this?

Q. Well, I am asking you, Mrs. Clayton. Can you tell me what those installments, current installments were at the time he passed away?

A. Do you mean how much they amounted to?

Q. To the various people, yes, ma'am.

A. I didn't pay his bills, so I don't know.

Q. You don't know that? A. No.

Q. Mrs. Clayton, isn't it a fact that during the

(Testimony of Charlotte H. Clayton.)

week or some weeks before Mr. Houston's death he was suffering from some back pain?

A. Yes, he had a stiff back.

Q. And isn't it a fact, in connection with the financial affairs that I have just been asking you about, Mrs. Clayton, that you folks, you folks spent about the amount of money that he made?

A. Yes, we lived very well.

Q. That you did, despite the fact that he made some \$20,000 [361] a year, isn't that correct?

A. True.

Q. Let me ask you this, Mrs. Clayton. Your present name is Clayton? A. That's true.

Q. And when did you remarry, please?

A. July 9, 1955.

Q. And to whom?

A. James O. Clayton.

Q. What is his occupation?

A. He is a research chemist with California Research Corporation, a subsidiary of Standard Oil.

Q. And had Mr. Houston known him?

A. Yes, sir.

Q. And you had been friends with your present husband during the lifetime of Mr. Houston?

A. Yes.

Q. For how long?

A. They were almost the first people we knew when we moved to Berkeley.

Q. How long was that?

A. About ten or eleven years.

(Testimony of Charlotte H. Clayton.)

Q. All right. Now, you and Mr. Houston had, I believe you stated, two children.

A. That's true. [362]

Q. Two daughters? A. That's right.

Q. Did Mr. Houston have any children by any former marriage? A. No, sir.

Q. And what is your occupation at the present time?

A. Until I was married I was a real estate salesman.

Q. Real estate salesman, is that correct?

A. That's true.

Q. And in connection with your activities as a real estate salesman, were you experienced in life insurance matters? A. No, sir.

Q. When was it exactly, Mrs. Clayton, that you first employed these investigators—reference has been made this morning to two investigators, a Dr. Kirk and a Mr. Bradford—when was it that you first employed them?

A. Prior to the time of the inquest.

Q. And just about how long before the inquest?

A. I can't tell you the exact date.

Q. I beg your pardon?

A. I don't know the exact date.

Q. Well, in reference to the date of death, how long after the death was it?

A. Three or four weeks.

Q. And when was it that you—let me ask you this, on the [363] date of the death, do you recall the police came there? A. Yes, sir.

(Testimony of Charlotte H. Clayton.)

Q. And you recall you spoke with the police officers? A. Yes.

Q. And when was it in reference to that that you employed counsel, that you employed any attorneys?

A. Within three or four days after my husband's death.

Q. And can you tell me exactly with reference to the date of death when it was, for example, that you discussed with Mr. Angell the situation?

A. Oh, not more than a week, I think, after my husband's death.

Q. A week after? A. Yes.

Q. Is that correct?

A. I can't say exactly.

Q. Well, what is the nearest that you can fix it accurately?

A. I would say a week or ten days, I am not positive.

Q. And when was it that you—. Did you speak with Mr. Allison? A. Yes.

Q. And when was that in reference to the date of death?

A. At this time I talked to Mr. Angell, Mr. Allison and Miss Tommy Angell.

Q. At the same time? [364]

A. At the same time.

Q. Did you speak with any other attorneys before that?

A. I talked to my friend, Mr. Hanscom, yes.

Q. When was that?

(Testimony of Charlotte H. Clayton.)

A. That was immediately after my husband's death.

Q. And how soon after?

A. Oh, within a day or so.

Q. And about the following day or day after?

A. Yes, sir.

Q. And are those the only attorneys you spoke with? A. Yes.

Q. Now, did you employ any other investigators or speak with any other investigators than Dr. Kirk and Mr. Bradford? A. No, sir.

Q. Do you recall when the police—do you recall when the police arrived that you spoke with the police officers who were on the stand here, that was a Mr. Pine and Inspector Parker?

A. Yes, sir.

Q. How soon after you went downstairs and saw your husband did you speak with these officers? A. As soon as they got there.

Q. Well, in point of time, Mrs. Clayton—what amount of time elapsed?

A. Oh, it couldn't have been more than half an hour. [365]

Q. And at that time, you told us yesterday, you had last seen your husband alive when he was, I believe you said it was in the hall.

A. He was coming in from the hall.

Q. All right. A. To the kitchen.

Q. What period of time elapsed between the time you saw him in the hall and the time that you heard the thud?

(Testimony of Charlotte H. Clayton.)

A. Very little time. I don't suppose more than a minute and a half passed, but I can't say exactly.

Q. One minute and a half?

A. It was a short time.

Q. Is that what you estimate it to be?

A. That is what I estimate it to be.

Q. When the police arrived and you spoke there with these officers, did you tell the officers that you and your husband, Mr. Houston, then had had a heavy weekend?

A. Heavy weekend?

Q. Yes.

A. I don't know what you mean by "heavy".

Q. I beg your pardon?

A. I don't know what you mean by "heavy".

Q. Did you tell them anything about a weekend?

A. I don't remember. They may have asked me what I was doing the night before. I don't think that they did. [366]

Q. Did you tell them that your husband had a heavy week coming up?

A. Yes, I did.

Q. And by "a heavy week coming up", you meant what?

A. Busy.

Q. Beg your pardon?

A. Busy.

Q. Did you tell them that he had been working extra hard?

A. Yes, sir.

Q. And did you tell them that at about this approximate period of the year he was getting out his annual report?

A. Yes, sir.

Q. And did you tell them that this approximate period of the year he had periodic periods of depression?

(Testimony of Charlotte H. Clayton.)

A. I said, "depression", possibly. I don't know what I said at that point. But I didn't mean by "depression" what your Dr. Bennett meant yesterday, I assure you.

Mr. Clausen: I ask the last portion go out as a voluntary statement, Your Honor.

The Court: It may go out.

Mr. Clausen: Q. Did you tell them at that time that your husband had been, during these periods, nervous?

A. I think I—I don't know, as I said, I was—you can imagine how I felt—I can't say I said this and I didn't say that. I can only say that I did not mean by "depression" [367] what you felt I meant.

Mr. Clausen: Again ask that go out.

A. I meant preoccupied.

Mr. Clausen: Again, Your Honor, we ask the last portion go out as to what she meant.

The Court: The question and answer will stand.

Mr. Clausen: Q. Now, at the time that you talked with the police officers—. Well, let me put the question this way: You don't mean to testify—or I will ask you the question this way: Surely, Mrs. Houston, or Mrs. Clayton, during the married life of your husband and yourself, you and your husband did have arguments, did you not?

A. Yes, we did have arguments.

Q. Your husband, that morning of his death, did not say to you, did he, that he was going down to the basement? A. No, sir.

(Testimony of Charlotte H. Clayton.)

Q. He had not—he did not say to you that he was doing down to get any gun?

A. No, sir.

Q. He did not say to you that he was going down to get any ammunition? A. No, sir.

Q. He did not say to you that he had any hunting trips coming up? A. No. [368]

Q. And you were, in point of truth, expecting him to come down and eat breakfast, isn't that right? A. That's true.

Q. Did you know, Mrs. Clayton, that at this point of P-3, the bookcase, or at any other place ammunition was stored?

A. This ammunition was stored everywhere around.

Q. Beg your pardon?

A. Ammunition was stored in all sorts of places, in our house, our basement.

Q. All over the basement? A. Yes, sir.

Q. What other places in addition to P-3?

A. I have seen it in suitcases, dresser drawers.

Q. And suitcases upstairs or downstairs?

A. Downstairs.

Q. Any dresser drawers upstairs?

A. Yes, sir.

Q. And in what dresser drawers?

A. Mr. Houston's dresser drawers.

Q. Up in his bedroom? A. Yes, sir.

Q. And in what other places have you seen it in the basement, Mrs. Clayton?

(Testimony of Charlotte H. Clayton.)

A. He had come in from—. I can't say this, can I? May I explain? [369]

Q. Well, just tell me what other places in the basement you had seen ammunition.

A. I have seen it on tables. He would come in from a trip or going out to the horses and just dump everything; wherever it fell, it fell.

Q. How long had it been, Mrs. Clayton, since he had been on a trip where he had fired any guns, when the death occurred?

A. He had been duck hunting.

Q. Beg pardon?

A. He had been duck hunting in November.

Q. The prior November, is that right?

A. Yes. But they took guns out when they went out to the horses, for target shooting.

Q. When he went duck hunting he used a shot-gun, did he not? A. I imagine so, yes.

Q. Did you see the bag of ammunition on this point of P.3 before the morning—or rather, before the day of the death? A. Yes.

Q. And you knew that was there?

A. Yes.

Q. And what kind of a bag was that?

A. A paper bag.

Q. Beg your pardon? A. Paper.

Q. Do you have the bag? [370]

A. No, sir.

Q. Does your attorney have it?

A. No, sir.

Mr. Clausen: Do you have that, Mr. Angell?

(Testimony of Charlotte H. Clayton.)

Mr. Angell: I haven't. You have never asked me. I do know where it is.

(Discussion between counsel.)

Mr. Clausen: Q. Well, the gun was taken, I understand, by the coroner, or the police, isn't that right? A. That's true.

Q. What kind of a paper bag was it that ammunition was kept in at this point of P-3 on the blackboard? A. It was a grocery sack.

Q. Just a grocery sack. You mean an ordinary paper bag? A. Yes, sir.

Q. And about how high a bag was it?

A. (Indicating).

Q. Indicating what?

A. About 14 inches.

Q. 14 inches. How wide a bag?

A. 8 or 9.

Q. 8 or 9 inches. And was that just an ordinary sack with an open end? A. Yes, sir.

Q. I beg your pardon? [371]

A. Yes, sir.

Q. Do you know what kind of ammunition was kept in there? A. No, sir.

Q. Do you know that—. Well, I will ask you this question: You testified this morning concerning your husband's habits. Your husband at all times, Mrs. Clayton, was careful with firearms, was he not? A. Yes, sir.

Q. During that morning, that is, the morning of this day, what time did you arrive yourself, Mrs. Clayton? A. 9:30, approximately.

(Testimony of Charlotte H. Clayton.)

Q. About 9:30. What did you do then, Mrs. Clayton?

A. My daughter and I had breakfast and sat in the patio in the sun.

Q. Then did you go out of the house?

A. No.

Q. I beg your pardon? A. No, sir.

Q. And then what did you do?

A. We decided to have lunch.

Q. And——

A. And I came in and I started lunch, and I went upstairs and asked my husband if he would like to come down.

Q. And then the police arrived. Could you tell me about the time that the police arrived at your home, Mrs. Clayton? [372] What time it was?

A. I couldn't tell you myself. I know what they testified. They said 2:15, I think.

Q. Does that coincide with your own recollection?

A. It does, although I was not aware of time at that point.

Mr. Clausen: Your Honor, may we take the recess now?

The Court: Very well.

(Whereupon a recess was taken until 2:00 p.m. this date.) [373]

Cross-Examination—(Continued)

Mr. Clausen: Q. You were asked, Mrs. Clayton, by your counsel concerning the electric light

(Testimony of Charlotte H. Clayton.)

in the basement. I am not sure whether this is in the record or not.

When you went down right after the shooting, that electric light was lit, was it not?

A. No, it wasn't.

Q. I beg your pardon? A. It was not.

Q. Had you been down there earlier that morning?

A. I think I had been hanging up some laundry, yes.

Q. Well, didn't you testify yesterday that you had gone down to do some laundry?

A. Perhaps I did.

Q. Well, now, are you able to recollect whether you had or had not before you went down after the shooting? Rather, had you gone down on this day before? A. I had, yes.

Q. Now, when you went down, did you turn on the light?

A. I turned it on, probably.

Q. All right. This was in the morning, was it?

A. Yes, sir.

Q. In the afternoon the sun comes through those two windows [374] to the west, doesn't it?

A. Yes, sir.

Q. And this happened in the afternoon around about 2:00 o'clock? A. Yes, sir.

Q. All right. Would you say there was a good deal of sunlight there at the time that you went down after the shooting?

A. Yes, there was sunlight.

(Testimony of Charlotte H. Clayton.)

Q. There are two windows on that westerly side? A. That's right.

Q. And your house was a corner house, was it not? A. No, sir.

Q. The house was facing another house to the west, was it?

A. No. Those windows are on the back of the house, on the down slope?

Q. Yes?

A. And there are pine trees planted, like this, that come up as high as the second story windows.

Q. Yes. And you also testified that—. Well, I will ask you the question: There is no house directly behind those windows, is there?

A. No, sir.

Q. Now, you testified concerning having gone to church. Was that the day before? [375]

A. Sunday.

Q. The day before the accident?

A. Yes, sir.

Q. And—rather—withdraw that.

The day before the death of Mr. Houston?

A. That's right.

Q. Now, the church that you went to was what church?

A. First Congregational Church of Berkeley.

Q. First Congregational Church. Were you and your husband members of the First Congregational Church of Berkeley? A. Yes.

Q. Did your husband go with you on the Sunday before? A. He did.

(Testimony of Charlotte H. Clayton.)

Mr. Clausen: That is all.

Redirect Examination

Mr. Angell: Just one or two questions.

Q. I don't recall what you said with respect to the light being on in the basement at the time that you found Mr. Houston.

A. The light was off.

Q. The light was off when you came down to the basement? A. Yes.

Q. And you saw Mr. Houston lying on the floor, is that correct?

A. Yes, sir. [376]

Q. Now, your mother was there in the house, was she not, at the time?

A. Yes, she was.

Q. At the time of the death. And where is your mother now?

A. My mother is in Colorado.

Q. Is she ill? A. She is not well.

Q. She has Parkinson's disease?

A. Yes.

Q. Mr. Houston was in his bathrobe and slippers at the time of the shot, is that correct?

A. That's correct.

Q. Was that anything unusual, for Mr. Houston to go about the house, in the basement, in his bathroom and slippers?

A. It wasn't unusual for any of us to. We live in a very secluded spot; nobody can see into our patio, even. We all went around in bathrobes, sat in the patio in bathrobes, always.

(Testimony of Charlotte H. Clayton.)

Q. When Mr. Houston came down and started in the basement in his bathrobe and slippers, that was not anything different than he had done before?

Mr. Clausen: Object to that, Your Honor, as leading and suggestive.

Mr. Angell: I am asking whether it was anything different than he had done before. [377]

The Court: You may answer.

A. It was not.

Mr. Angell: I think that is all.

The Court: Step down.

(Witness excused.)

Mr. Angell: Mrs. Hanscom.

ANN HOUSTON HANSCOM

called as a witness on behalf of the Plaintiff; sworn.

The Court: Your full name, please?

A. Ann Houston Hanscom.

The Court: Spell your last name for the reporter. A. H-a-n-s-c-o-m.

The Court: Where do you reside?

A. At Hunter's Point.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. You are the daughter of Mr. William Houston who was the insured in the policy sued upon here, Mrs. Hanscom? A. Yes.

Q. And you have a sister; is she older or younger than you?

(Testimony of Ann Houston Hanscom.)

A. Four years older.

Q. Her name is Charlotte? [378]

A. Yes.

Q. You are married, are you not?

A. I am.

Q. When were you married?

A. June 25, 1955.

Q. What does Mr. Hanscom, your husband, do?

A. He is in the Navy, an ensign.

Q. Prior to your marriage, where did you reside?

A. 1028 Miller Avenue, Berkeley.

Q. Were you residing with your family on the morning of February 22, 1954?

A. I had lived in my sorority house the week of rushing but I came home that Sunday night to spend the night because the next day—

Q. You were there over the weekend of Washington's Birthday weekend of 1954, is that right?

A. I was there Sunday only. I was at my sorority house Saturday.

Q. You were there Sunday, home Sunday?

A. Yes.

Q. And Monday? A. Yes.

Q. Tell us, before you went to the University of California and lived there, did you live there at home, in the family home? [379]

A. Yes.

Q. Describe your family relationship with respect to whether it was a close association or a distant one.

(Testimony of Ann Houston Hanscom.)

Mr. Clausen: I object to that, Your Honor, as calling for the conclusion of the witness. What may have been close to the young lady on the stand, to another person may not be. It would be calling for her own impression.

The Court: The objection will be overruled. She may answer.

A. Oh, well, I would say it was very close. Yes, we did lots of things together.

Mr. Angell: Q. Did you go to social events together? A. Yes.

Q. You went riding together on weekends?

A. Yes.

Q. Went fishing, hunting together?

A. Not hunting.

Q. You didn't hunt? A. No.

Q. Would you go up to Southern Oregon, to Lakeview, with your father? A. Yes.

Q. And had that been the custom for years?

A. As long as we had the cabin in Oregon, it had been the custom. [380]

Q. You were in the home on the morning—on the day of February 22, 1954, were you?

A. Yes.

Q. And the night before, had you been out to any social function?

A. Yes. We went to the Hanscoms for dinner and I don't remember what time Ron and I left for dinner, then to a movie, because the next day was a holiday.

(Testimony of Ann Houston Hanscom.)

Q. You heard your mother testify, did you not, as to who was present at that party?

A. Yes.

Q. Is that your testimony? Would it be the same? A. Yes.

Q. Was there any drinking at that party or dinner?

A. I think we all had one or two.

Q. Was that before or after dinner?

A. Before.

Q. You just had one or two?

A. We always do over at the Hanscoms. I believe so.

Q. Were they cocktails?

A. Yes, I believe so, yes.

Q. Did you observe your father's conduct and behavior on that night? A. Yes.

Q. On February 21? [381] A. Yes.

Q. Will you just tell the Court in your own words how you observed his demeanor and actions?

A. He acted perfectly normal.

The Court: You will have to raise your voice so the reporter can hear you.

Mr. Angell: Will you speak up? The reporter has to get the answer and these gentlemen out here have to hear it—if you can, Mrs. Hanscom.

A. Well, it is just like any other dinner we had before at the Hanscoms.

Mr. Angell: Q. Did you notice any difference in your father's actions or in his speech?

A. No, I didn't.

(Testimony of Ann Houston Hanscom.)

Q. Was it different than at any other time?

A. No.

Q. Did your father act depressed or morbid or melancholic at all? A. No.

Mr. Clausen: Object to that as calling for the conclusion of the witness.

The Court: Objection overruled.

Mr. Angell: Q. Did he join in the conversation and take part in the discussion with other people there? A. Yes, he did. [382]

Q. What time did you leave there, if you can recall?

A. I am not sure. In order to see an entire movie, it must have been about, oh, 8:30 or 9:00, I imagine.

Q. You came back and stayed home all the night of Sunday, is that right? A. Yes.

Q. And you were there in the morning?

A. Right.

Q. Now, on Sunday morning did you get up early? A. Yes.

Q. What time, about?

A. About 9:00 or 9:30.

Q. And just state then the events that occurred there at the home on that day, up until you found your father's body in the basement.

A. Well, it was unusual for mother and me to get up that early on a holiday but we—I had some washing to be done—so mother did the washing, and, well, we had breakfast first. And we ate breakfast in the patio and stayed out in the sun. And

(Testimony of Ann Houston Hanscom.)

then we got hungry for lunch and mother started getting lunch ready. And she went up and asked Daddy if he would like to come down to lunch. And he said, "yes."

Mr. Clausen: Now, just a moment. Your Honor, that's the vice of the voluntary—I mean vice of the broad question. There is no showing that this—that the witness was present [383] and heard the conversation between her mother and father. We object to the statement, Your Honor, and ask it go out.

Mr. Angell: Q. Did you hear what your mother said to your father? A. No.

Mr. Clausen: We ask therefore that that testimony go out.

Mr. Angell: It may go out.

Q. Just confining to what you heard and saw yourself and not what you heard from somebody telling you. A. All right.

Q. You started to get lunch?

A. Yes. And I wanted to hang a shelf in the hall outside of the kitchen, and I got out my hammer and nails and was putting that up and had put it up and I was putting the hammer and nails away when Daddy came downstairs into the kitchen, and I was singing, "Oh, what a Beautiful Morning", and he came up to me and gave me a good morning peck on the forehead, and said it certainly was a beautiful morning.

And I told him we were going to have steak for breakfast. And he said that sounded wonderful.

(Testimony of Ann Houston Hanscom.)

And then——

Q. How was he dressed at that time?

A. Bathrobe, slippers and pajamas.

Q. Did he have any gun in his hand? [384]

A. No.

Q. Did he have any different look in his face than he did at any time? A. No.

Q. Did he display any erratic look?

A. No.

Q. Did he look happy, was he smiling?

A. Yes, he was.

Q. And then where did he go from there, do you know?

A. I don't know. I went into the living room to speak to my grandmother.

Q. And then what next occurred, that you were familiar with the happenings?

A. Then I heard a bam!—and I came back into the hall because I thought my shelf had fallen, and I called to mother and I didn't get an answer. Then the next thing I knew, she called me and said, "And, as quickly as possible, call the ambulance."

Then I ran downstairs into the basement and saw Daddy.

Q. What time do you say it was—how much time had elapsed from the time you spoke to your father there in the hall and he gave you a peck, how much time would you say it was to the time you heard what you described as a bam or wham?

A. Just enough time for me to walk from the door of the kitchen into the living room. [385]

(Testimony of Ann Houston Hanscom.)

Q. Could you estimate it in minutes or——

A. A minute.

Q. That would be——

A. To about a minute and half.

Q. Two minutes, maybe? A. Uh-huh.

Q. Now, would you step to the blackboard here, Mrs. Hanscom, and take a look at this exhibit, Plaintiff's Exhibit 1, and would you look at these marks that are marked—I believe that's—I can't make out that one.

Mr. Adams: C-1, it should be.

Mr. Angell: Q. C-1, I think it is. Isn't it?

A. This?

Q. Yes, this. Can you read that?

A. No, I can't.

Q. It looks like a C-1. It's the X right next to the washing machine shown on this exhibit.

And I ask you if your father's body was lying near there or how you would place your father's body when you first saw it.

A. I would say right there (indicating).

Q. You would place it about the same place, that X, and will you just give it a new mark so that we can identify it for the record. Will you call that H-1? A. Right here? [386]

Q. Yes.

A. (Witness designating H-1 on Exhibit 1.)

Q. Will you take a pointer here and will you just quickly describe the condition of this basement at the time that you were there over that weekend of the 22nd, just generally, quickly?

(Testimony of Ann Houston Hanscom.)

A. You mean including the things that are——

Q. I think you go right ahead and describe the whole area in there, quickly.

A. There are lines of laundry hanging on the lines—with laundry on the lines against—coming from the west wall—and tables to the right as you come in the door from the stairs down to the basement, newspapers and boxes, newspapers and so on; and then washing machine—beg your pardon—I meant to the left, the tables are to the left, and the washing machine is to the right. Another table and the ironer, and the whole basement is on three levels. The ironer and laundry on the level that you come to as you enter the door.

Q. That has been designated by your mother as the area known as C-6 outlined in green. Now, that is one level. A. Yes.

Q. Now, looking at the area outlined in red, which is labelled C-3——

A. That's another level.

Q. About what level would you say that is?

A. You mean how much higher than the other level?

Q. Well, how high is it from the floor to the ceiling?

A. Five eleven, approximately.

Q. And then the other level is as shown on here, C-4, is that correct? A. Yes.

Q. Now referring to these levels as you describe the contents, just so they get in the record and we will know what we are talking about, are the ob-

(Testimony of Ann Houston Hanscom.)

jects which are shown on this exhibit, Plaintiff's 1, which you have stated were in the area designated C-6 here, were those objects in about the same position as shown on this map on February 22, 1954? A. Yes.

Q. Is that true of the objects that are shown on the map in the area shown as C-3?

A. Yes.

Q. And now nothing is shown on the map in the area of the map C-4. Will you state just briefly what was in that area, if anything?

A. How do I explain? At the place where the step-up was to the high level, Daddy hung all his saddles and his fishing boots and there were, oh, suitcases full of belts and socks and things he used on his hunting trips, and some old boxes up on this highest level, and golf clubs and tennis rackets, I believe. [388]

Q. Tennis rackets? A. Uh-huh.

Q. Did your father play tennis?

A. I believe he used to, years ago.

Q. Now, did you ever see any guns in that area at all?

A. Yes, in this area (witness indicating P-3).

Q. You are pointing at what area?

A. P-3.

Q. On Plaintiff's Exhibit 1.

A. Is that right, P-3?

Q. P-3 refers to a bookcase in the area shown here is C-3. Now, will you——

A. Well, they were in the corner.

(Testimony of Ann Houston Hanscom.)

Q. Well, there are words on this Plaintiff's Exhibit 1, "brooms and sweeper"; would they have been in that corner? A. Yes.

Q. Now, did you see guns at any time any place else in the basement—at any time?

A. Yes.

Q. Where did you see any guns at any time?

A. There were some lying on this section, yes, right here (indicating).

Q. That is, when they were there—you had seen some there—you mean at some time or other?

A. Yes. [389]

Mr. Clausen: Indicating——

Mr. Angell: She is indicating——

Mr. Clausen: ——the northeast corner of the section rimmed in green.

Mr. Angell: Let's get at it this way.

Q. Did your father, so far as you observed, and you know of your own knowledge, keep his guns or was in the habit of keeping them this one place (indicating)?

A. Yes, in this place (indicating).

Q. He kept them usually up where it says—what is that legend up there in Plaintiff's Exhibit 1?

A. "Brooms and sweeper."

Q. Now, did he keep them elsewhere, at any time? Had you noticed guns around elsewhere at different times?

A. He used to keep a pistol in his closet shelf.

(Testimony of Ann Houston Hanscom.)

Q. Did you ever see any rifles or shotguns up in his closet? A. Yes.

Q. Had you ever seen them in other places in the basement?

A. Not that I can remember.

Q. Did you on that morning of February 22, when you went down in there, observe any guns at all? A. No, I didn't.

Q. You didn't see any guns? A. No.

Q. On that particular morning? [390]

A. No, I didn't.

Q. Did you not see the gun which your father was shot with? A. No.

Q. You didn't go back in that corner, is that right? A. I did not.

Q. You can put that down and resume the stand.

Had you ever at any time in your life heard your father make any statement that he intended or was going to commit suicide? A. Never.

Q. Did you observe your father's demeanor that weekend when you were home, as to whether he seemed to be his natural self, or did you see anything different about him than the usual way he looked or talked?

A. No, I didn't.

Q. Did he appear to be happy and about the same as he always was, at that time?

A. Yes.

Q. There was nothing that led you to be suspicious? A. No.

(Testimony of Ann Houston Hanscom.)

Q. Do you know anything about your father's illnesses, was your father a man who was ill very much? A. No.

Q. Do you recall him ever having any serious illness of any kind? [391]

A. No, I can't.

Q. Did you ever hear your father state that he was troubled or worried, disturbed in any way about his finances? A. No.

Q. Now referring to your father's use of alcoholic beverages. Had you ever seen your father take a drink? A. Yes.

Q. Will you just state in your own words to the Court about how you would describe your father's drinking, from time to time, say——

Mr. Clausen: Your Honor, we object to that as asking this witness to speculate. In other words, he is asking the witness to put an interpretation upon a habit, which is purely a conclusion or opinion of this witness.

Mr. Angell: I ask her to state what she saw.

Mr. Clausen: You asked her——

The Court: She may state what she saw, if anything.

A. He would take one or two or sometimes no drinks at all.

Mr. Angell: Q. And was there any time that you can recall when your father was not drinking anything? A. Yes.

Q. When was that period, do you know?

A. I would say a year before his death.

(Testimony of Ann Houston Hanscom.)

Q. Did he ever tell you why he wasn't at that time?

A. He was on a fat-free diet, I believe. [392]

Q. Trying to take off weight?

A. Yes.

Q. Did you ever, in all the years you lived with your father, all the trips you took with him, ever see your father intoxicated?

A. Never in my life.

Q. Did you ever see your father drink so much alcohol or where he had had so much alcohol that he was unable to drive his automobile?

A. Never.

Q. Or staggered? A. Never.

Q. Or walked with uncertainty?

A. Never.

Q. Did you ever see your father when he had so much alcohol that he was not coherent in his speech? A. No.

Q. And wholly rational in his speech? Did you ever see him in that condition? A. No.

Q. When such times as you were home and when you were living home, did the family have any custom as to whether they got up early or slept late around the holidays, the weekend?

A. We always slept late, when we could.

Q. You had always slept late? [393]

A. Yes, we always did.

Q. I think I have asked this question of you, and that is, was it your father's custom or habit

(Testimony of Ann Houston Hanscom.)

to go about the house and the basement in his pajamas and bathrobe? A. Yes.

Q. There was nothing unusual about that?

A. No, nothing at all.

Q. Did you ever see shells around the house?

A. Yes, sir.

Q. Where did you see shells?

A. Anywhere, really, he kept them in his drawers and his—he kept them wrapped up in old socks.

Q. In other words, as far as you know, your father had no real shell place where he kept shells; he just kept them anywhere, is that right?

A. Anywhere.

Q. Did you notice whether your father had his glasses on at the time he went into the basement—at the time you went into the basement and found his body there?

A. No, I didn't notice at the time.

Q. Did you subsequently determine that he had not? A. Yes.

Q. How did you determine that?

Mr. Clausen: I object to that as what the witness didn't see and asking her to speculate what happened. [394]

Mr. Angell: I am asking—no.

Q. After you found your father's body, did you find his glasses? A. Yes.

Q. Where were they?

A. On his dresser in the bedroom.

Q. Did your father always wear glasses, whether he was working or reading or not?

(Testimony of Ann Houston Hanscom.)

A. Yes.

Q. As part of his dress, all the time?

A. Yes.

Q. Did you go up to Southern Oregon with your father on any trips?

A. Yes. The whole family did, when we all could.

Q. How many times would you go up there?

A. How do you mean?

Q. Over the past four or five years prior to your father's death.

A. Four or five times, I guess.

Q. I beg your pardon?

A. Four or five times. We went up every summer.

Q. What would you do up there?

A. We would swim and ride and hike, fish.

Q. Now, when you were up there with your father and saw him, did you notice that he had any different habits toward [395] drinking than he did down at home? A. No.

Q. Prior to the date of February 22, 1954, the time you found your father's body, had you seen guns back in that back part marked "Brooms and sweeper"? A. Yes.

Q. On Plaintiff's Exhibit 1? A. Yes.

Q. Did you ever know a Robert Utley?

A. Yes.

Q. Was he the son of Mr. Harry Utley?

A. Yes.

Q. Mr. Harry Utley was in business with your father? A. Yes.

(Testimony of Ann Houston Hanscom.)

Q. And you knew him, how long ago, do you believe?

A. I think I met him first when we went up to Oregon for the first time.

Q. And did he ever come out to your cabin?

A. Mr. Utley?

Q. Robert? A. Yes.

Q. And you went and saw him in his father's home, Mr. Harry Utley's home?

A. At their home and at their cabin—at Mr. Utley's home, Harry Utley's home. [396]

Q. And social events also when he was present?

A. Yes.

Q. Did you ever examine any of your father's guns when you saw them prior to the 22nd of February, 1954, to determine whether they were loaded or not? A. No, I didn't.

Q. Did your father ever say anything to you as to whether he kept his guns loaded or not?

A. He said he always kept his guns loaded.

Q. Now, what was the occasion that he told you that? How did he come to mention that to you, if there was any reason?

A. Why, I had known it all my life.

Q. Well now, he told you that at one time. What did he tell you about it?

A. He just said they were always kept loaded.

Q. Any other times when you were around the home there and your father was home, did you ever see him working down in the basement with any of his sports gear? A. Yes.

(Testimony of Ann Houston Hanscom.)

Q. In his bathrobe? A. Yes.

Q. And will you just tell us what you saw him doing at the time you went down?

A. Just puttering around in his—with his equipment, and polishing his—oiling his saddles and his leather goods and [397] he made leather belts and cleaned his guns.

Q. There has been much said here—you heard in the testimony—about a report that your father was getting out. Do you know anything about that report? A. Personally?

Q. Yes. I mean, that he was getting out such a report? A. No, I didn't know it.

Q. You didn't know it. Nothing was said about it? A. No.

Q. In other words, nothing was said in the home that weekend about that report that you heard, is that correct?

A. No; that's correct.

Mr. Angell: I think that is all.

Cross-Examination

Mr. Clausen: Q. Mrs. Hanscom, as I understand it, you had been away to school, is that right?

A. I went to school at the University of California in Berkeley and I had been staying for one week at my sorority house, during rushing.

Q. This was immediately before this Sunday that you testified that you came home for the night?

A. Sunday evening, yes.

Q. Yes. And, as I understand it, you were, Mrs.

(Testimony of Ann Houston Hanscom.)

Hanscom, upstairs in the house at the time of the shooting? A. No, I was not. [398]

Q. You were upstairs. By "upstairs" I mean——

A. Yes, I beg your pardon.

Q. You were certainly not in the basement area.

A. No.

Q. You were on the first floor area, upstairs from the basement? A. Yes.

Q. And did I understand you, Mrs. Hanscom, to say that your mother had gone down first following this noise? A. Yes.

Q. And that she called to you?

A. She did.

Q. When she called to you, where was she, downstairs? A. Yes.

Q. And at the time that she called to you, was the light lit downstairs, was the light lit in the basement? A. I don't recall.

Q. You can remember that? A. No.

Q. As a matter of fact, Mrs. Hanscom, you did not, when you went down, go into this area which is rimmed in red here in the northwest section of the house, is that correct?

A. That's correct, I did not.

Q. You did not even see the gun in question?

A. No, I didn't. [399]

Q. And therefore, when you—well,—. How long a period did you remain down in the basement after you went down, Mrs. Hanscom?

A. Oh, not very long before I ran upstairs to call.

(Testimony of Ann Houston Hanscom.)

Q. Then you went up and called the police?

A. I couldn't call.

Q. I beg your pardon? You did not call? Who did call the police?

A. My grandmother, Mrs. Spaulding.

Q. All right. Then did you go back downstairs again? A. Yes.

Q. And were you downstairs when the police arrived? A. Yes.

Q. And did you talk to the police with your mother? A. Yes.

Q. And did your grandmother also speak to the police? A. Not that I remember.

Q. Was she downstairs when the police arrived?

A. No, she was not.

Q. She remained upstairs? A. Yes.

Q. And when the police arrived how long a time were you downstairs, Mrs. Hanscom?

A. With the policeman?

Q. When the police were there, yes. [400]

A. Oh, I can't remember.

Q. Well, can you estimate it roughly, Mrs. Hanscom? After the police got there, when they were downstairs, you were there; how long were you there with the police, with them?

A. Oh, four or five minutes.

Q. Beg your pardon?

A. Four or five minutes.

Q. Four or five minutes. Now, what time elapsed between the time that your father passed you or spoke to you in the hall and when you heard the shot?

(Testimony of Ann Houston Hanscom.)

A. Oh, not very long, just, as I said, enough time to go from the door of the kitchen into the living room.

Q. That is for you to go from where you went into the living room, is that correct?

A. (Witness nods head.)

Q. Just say yes or no. The reporter can't see you nod your head, Mrs. Hanscom. The time that that would take roughly in your own mind, as you estimate it, would be how much?

A. A minute or a minute and a half or two.

Q. All right. Now, would you step to the blackboard again, Mrs. Hanscom?

You indicated a portion which I at the time said was in the northeast corner. You indicated a portion in the northeast corner of what I said was an area rimmed in green as where you had seen guns before. [401]

Will you point to that, please?

A. In this area, right here?

Q. Yes.

A. I believe I saw along here (indicating).

Q. All right. Would you put marks where you believe you saw them? Put an X—X at the places where you believe you saw them.

A. (Witness designating.)

Q. All right. Now, I will mark that H-1—I don't believe there is an H——

Mr. Adams: Yes. H-2.

Mr. Angell: That's H-2.

(Testimony of Ann Houston Hanscom.)

Mr. Clausen: All right, H-2. (Counsel writing "H-2" on Exhibit 1.)

You may resume the stand, if you will.

Q. How many times, Mrs. Hanscom, did you see guns in that portion marked H-2?

A. Just once.

Q. And when was that?

A. Well, a pretty long time ago. I remember, because Ron, my husband, had mentioned that they were all loaded.

Q. There on that place of H-2?

A. Yes.

Q. Is that correct? A. Yes. [402]

Mr. Clausen: And may I have the gun there, please.

Mr. Angell: You nod your head, Mrs. Hanscom. The reporter can't get it.

The Witness: I beg your pardon.

Mr. Clausen: Q. From looking at this gun, would it be a gun that resembled this in appearance?

A. I don't know anything about guns.

Q. All right. You can't answer that, then. All right, Mrs. Hanscom. You stated—well, let me ask you this question: I notice on the diagram on the board the area reserved for servants.

Were there full-time servants in the house then?

A. No, we used that when my grandmother came to visit.

Q. Was that where your grandmother stayed?

A. Yes.

(Testimony of Ann Houston Hanscom.)

Q. In that area then on the basement floor?

A. Uh-huh.

Q. And was she staying there at the time?

A. Yes.

Q. Now, you stated that your father always wore glasses. Isn't that correct?

A. I did.

Q. So when he came down this day, on this particular Washington's Birthday with no glasses on, that itself was unusual, was it not, Mrs. Hanscom? [403]

A. He didn't put them on the minute he got out of bed.

Q. I beg your pardon?

A. He didn't put them on the second he got out of bed.

Q. In other words, it was not unusual for him to go about the house without glasses, is that right?

A. Well—he wore them most of the time, but he didn't pop them on his face the minute he got out of bed.

Q. I understand. So I am asking you whether it was usual for him then to come downstairs, for example, to breakfast, without wearing his glasses.

A. Would you repeat that?

Mr. Clausen: Would you read it back, Mr. Reporter?

(Question read.)

A. No.

Mr. Clausen: That is all.

(Testimony of Ann Houston Hanscom.)

Redirect Examination

Mr. Angell: Q. Mrs. Hanscom, would you step to the board, Plaintiff's Exhibit 1. Would you mark an H-3 to show the hall where you were putting up that little shelf?

Mr. Clausen: Well, as I understand this, counsel, is this not a diagram of the basement?

Mr. Angell: It is in the basement. I want to locate that hall in respect to the basement.

Mr. Clausen: Well, as I understood the witness' testimony, she was putting the shelf up on the upper floor. [404]

Mr. Angell: That's right. I want to show above what area in the basement.

Mr. Clausen: Above the basement area?

Mr. Angell: Yes.

A. It would be right here, but there is—it's right——

Mr. Angell: Q. You look at it good and get oriented before you put anything on it.

These are the stairs coming up to the kitchen. What room of your house was right directly over the servants' quarters?

A. The kitchen.

Q. That was the kitchen. A. Yes.

Q. Now, what would be directly above the furnace room? A. The hall.

Q. And what hall would that be?

A. Front hall.

Q. Was it in that hall where you were putting the shelf?

(Testimony of Ann Houston Hanscom.)

A. No, it was—. Well, there is a hall that goes from the front hall into the kitchen. It was that hall.

Q. In other words, you have a double hall there?

A. It is a little one with a powder room off it.

Q. It was in that hall that you were putting this shelf up when your father came down, is that correct? A. Yes. [405]

Q. And he passed through that in order to go through the kitchen in coming downstairs?

A. Yes.

Mr. Angell: That is all.

Mr. Clausen: No further questions.

(Witness excused.)

CHARLOTTE H. GUSTAFSON

called as a witness on behalf of the plaintiff; sworn.

The Court: Your name, please.

A. Charlotte Houston Gustafson.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. Now, you are the daughter of Mrs. Clayton who is here, and Mr. Houston, deceased, who was the assured under the policy sued on here, is that correct? A. I am.

Q. Mrs. Gustafson, where do you reside?

A. At 2921 Florence Street in Berkeley.

Q. And are you married? A. I am.

Q. What does your husband do?

A. My husband is the assistant production con-

(Testimony of Charlotte H. Gustafson.)

trol manager at United Centrifugal Pump Company in Oakland.

Q. And how long have you been married? [406]

A. Since March 24th, 1951.

Q. Now, prior to your marriage did you attend the University of California? A. I did.

Q. You are a graduate of that institution?

A. I am.

Q. Do you have any children?

A. I have one daughter.

Q. Up to the time you were getting married in '51 did you live home or did you live in the sorority house while you were in college?

A. I lived predominantly at home. I lived I believe out of the four years perhaps three weeks, maybe four in my sorority house.

Q. While you were living at the sorority house during that year would you go home frequently?

A. Oh, yes.

Q. And during your——

A. During weekends.

Q. And during your college years, why, when you were not at the sorority you would go home and stay, is that right? A. That is true.

Q. And after you finished the university did you return to home to live or did you get married before?

A. I was married the March before graduation in June. [407]

Q. Now, after your marriage did you always make your home there in Berkeley?

A. Yes.

(Testimony of Charlotte H. Gustafson.)

Q. Would you see your family frequently?

A. Yes, I would say frequently.

Q. During weekends from time to time?

A. Yes. Yes.

Q. Did you attend social functions with them?

A. Yes, both my husband and I did.

Q. And did you have vacations to southern Oregon also?

A. Yes, we both went to southern Oregon with my family.

Q. Will you describe your relationship with your father and your mother, the family relationship, just in short, brief words? Was it a close relationship?

A. It was a close relationship and a very happy one. We were both—I shouldn't say "both"—but there was mutual love and respect and admiration, I believe.

Mr. Clausen: Well, ask the answer go out, your Honor, as a conclusion of the witness, rather a long answer.

A. I'm sorry.

Mr. Clausen: The answer, your Honor, being the impression of the witness, obviously, of the marital life between father and mother, and it is not responsive to the question, either, in the sense that it is her own impression.

The Court: Well, she may give her impressions, may [408] she not? Objection overruled.

Mr. Angell: Did you hunt and fish with your father?

(Testimony of Charlotte H. Gustafson.)

A. I didn't like to hunt. I loved to fish.

Q. Did you like to fish?

A. Yes. And to ride.

Q. You rode horseback with your father?

A. Yes. Yes.

Q. You went up to southern Oregon and on trips with him?

A. Yes. Since I was a little girl we did that every summer.

Q. Was your father a good sportsman?

A. I considered him excellent.

Q. Could you rope a cow?

A. Yes, and me.

Q. And you? A. Yes.

Q. And your father had spent earlier years on a ranch, had he not?

A. Yes, as a boy. Yes, he told me he had.

Q. Were you at the dinner at the Hanscoms' the night before February 22, 1954?

A. No, neither my husband nor I were there.

Q. Neither of you were there. When prior to February 22, 1954, was the last time that you were in the basement of your father and mother's home on Miller Avenue where your [409] father was shot?

A. Well, it's kind of difficult to know for sure. I would have to sort of guess, because I did my washing and my ironing once a week, sometimes twice, at my mother's, in her basement, so it was either the week prior to daddy's accident or the

(Testimony of Charlotte H. Gustafson.)

week previous to that. You see; do you see what I mean?

Q. In other words, you can recall it was within two weeks of your father's death?

A. Oh, yes. Yes.

Q. And prior to that did you from time to time go up and into the basement?

A. Yes, because I had large cardboard cartons full of things that I never had room for in my own apartment once I was married, so I would go see them there.

Q. You had things—household things?

A. Household things, as well as——

Q. Stored in that basement, is that right?

A. That is true.

Q. And from time to time did you go into the basement? A. Yes.

Q. And where did you keep your things mostly in that basement, with respect to your wedding presents?

A. Always in the storage—the room marked “Storage.”

Q. On Plaintiff's Exhibit 1? [410]

A. Yes.

Q. Could you make an estimate of the size of this room marked “Storage”?

A. Well, it wasn't very big, because—well, I'm sure I couldn't have lain down on the floor—that is, within—. I would say maybe five feet by five or four and a half by four and a half.

Q. Did you have a large quantity of things stored in there?

(Testimony of Charlotte H. Gustafson.)

A. Oh, yes, shelves. There were shelves.

Q. That room was pretty well loaded, is that right?

A. Yes, shelves on two sides.

Q. Will you just quickly describe the nature of the area here shown in Plaintiff's Exhibit 1 as the basement area where the laundry was located and just tell us quickly what was kept in there, what was the place used for, as you observed?

A. Well, the first level where the clothes lines are indicated was the washing machine, the heater, the ironer and the clotheslines and the sewing machine, and mother kept cartons and newspapers, and things like that.

Q. Will you step down here to this exhibit, Plaintiff's Exhibit 1, and I direct your attention to the area marked "Brooms and sweeper" and the area within red marked C-3, and I ask you if you—ask you when was the last time you ever looked in there prior to February 22, 1954. [411]

A. Well, I always hung my sheets along here. The last time I washed, oh, those, I always hung—hung the sheets near the windows, and I faced this way, so undoubtedly the last time I washed my clothes, which was in the last two weeks before daddy's accident, I could see into that place.

Q. Do you know whether at that time you saw any gun or guns in there?

A. I can't swear I saw them that time, no, but I have seen them when I was there.

(Testimony of Charlotte H. Gustafson.)

Q. Had you ever seen guns in the area marked "Brooms and sweeper"? A. I have.

Q. And would there be one or more than one?

A. I would say more than one.

Q. Usually more than one?

(Witness nods head.)

Q. Do you know anything about guns?

A. I know a pistol from a rifle and so on—shotgun—but I have never shot a rifle or a shotgun. I have seen daddy loading and cleaning—but I have never shot one.

Q. Do you know anything about whether your father's custom or habit was to keep his guns loaded or unloaded?

A. It was his custom to keep them loaded.

Q. How do you know that?

A. Because he would show me that they were loaded or I [412] would check, if a pistol—I have checked a pistol to see if it is loaded.

Q. Do you know how to check?

A. I know daddy's kind of pistol.

Q. Did your father ever tell you his reason for keeping his guns loaded?

A. No. That's just the way he did things.

Q. Did you ever see shells anywhere around in the basement area, shown by Plaintiff's Exhibit 1?

A. I believe I saw shells on the bookcase.

Q. Have you seen them any place else?

A. The basement, you mean?

Q. Yes.

A. Golly, he had everywhere—this I think has

(Testimony of Charlotte H. Gustafson.)

been brought out before—he had his clothes and saddle equipment and hunting and fishing, all those things, everything there practically, everything; he would keep shells there as well as I had seen them in the dashboard in the car—you know, the glove compartment—and in his dresser drawer upstairs, and in socks and in sacks; it seems everywhere.

Q. Do you know what kind of shells they were or were they all kinds?

A. Some of them were pistol kind of shells and some of those large red cartridges with the brass on the end—I think that's for a shotgun—I am not sure. [413]

Q. Was this area designated C-3 on Plaintiff's Exhibit 1 loaded with merchandise or property of some kind?

A. You mean was it loaded with guns?

Q. Objects—— A. Yes.

Q. ——and things. A. Yes.

Q. Was it pretty well filled up?

A. Very well filled up.

Q. In the area marked C-4, was that area used for anything in particular?

A. Nothing but storage.

Q. What was stored in there?

A. To the best of my recollection just cartons and cartons of books, clothes, there was some furniture, badminton racquets, as well as tennis racquets, golf clubs, just piled high.

Q. Any fishing equipment?

A. Not in here.

(Testimony of Charlotte H. Gustafson.)

Q. Where was the fishing equipment?

A. Over in here.

Q. It used to be kept over here with the brooms and sweeper? A. That's correct.

Q. And how about saddles? [414]

A. Saddles were hanging here, along this way, and I have also seen daddy's hip boots hanging up as well.

Q. Now, referring to the area where it says "Bookcase" and then there is an open area—bedding—in the Exhibit 1—in the area designated C-3. What was in there the last time you saw it?

A. In this area?

Q. In the area between the bookcase and bedding? A. The last time I saw it?

Q. Just the general nature of the material that was in there, if you recall.

A. Well, I can't say with assurance whether I saw it absolutely the last time I looked.

Q. You couldn't specifically identify it?

A. Not specifically, no.

Q. All right. Now, you may take the stand.

Would you spend some weekends up with your father and mother there at that home even after you were married?

A. Yes. My husband and I both spent vacations up there.

Q. Did you father—was it a habit or a custom or did he frequently go down into the basement when he was in his bathrobe and slippers?

A. I never lived at 1082 Miller, but that was

(Testimony of Charlotte H. Gustafson.)

the custom of his when we were living at 900 Shattuck Avenue, which was the house in which I lived with my family prior to my marriage. [415]

Q. Was it the custom of the family to get up early or late on these weekends?

A. Late.

Q. They were late sleepers? A. Yes.

Q. Incidentally, did you go into the room marked "Storage" to get things out from time to time? A. Yes, quite often.

Q. At any time that you ever went in there did you ever see any guns kept in there?

A. I never saw any guns in there ever.

Q. Did you see the two guns that were in there after your father's death?

A. Yes, I think I saw them.

Q. Had you seen those before the last time you were in there? A. No, I had not.

Q. Did you ever discuss with your father the condition of his health or did you——

A. No.

Q. Did you ever hear him complain about any ailments? A. No, I did not.

Q. Did you ever know of any serious illness that your father had? A. No. [416]

Q. You knew he did have sinus trouble, did you not? A. Yes, I did.

Q. He took some medicine for that?

A. I believe he did.

Q. Did you know Robert Utley?

A. Yes, I did.

(Testimony of Charlotte H. Gustafson.)

Q. Will you state who he is?

A. He is the son of Harry Utley and the brother of Virginia Wilkerson and a friend of my father's.

Q. You met him where?

A. And a friend of my father's.

Q. And a friend of your father's. Where did you meet him?

A. I met him in Oregon through his father, through Harry Utley and my dad.

Q. Can you fix approximately when you met him, how long you have known him?

A. I suppose the first year that we had the Oregon property up there.

Q. Do you recall about what year that was?

A. No. It must be some place in the notes. I think it was after I was married.

Q. When were you married?

A. Well, I was married in '51, so it was probably the summer of '51.

Q. That was the first time you met him, about the summer [417] of 1951?

A. Yes, I think so.

Q. Did you see how much your father drank at different times when you were out and around the home when he was present? A. Yes.

Q. And will you just state in your own words what you observed of your father drinking and at such times as you observed it over the years as you knew him and when you saw him up until the time of his death?

(Testimony of Charlotte H. Gustafson.)

A. Well, when he would come with my mother for dinner at my house we wouldn't have anything to drink, and when we would go up to their house for dinner sometimes we would have something to drink, sherry or beer or a highball, before dinner, sometimes nothing. I can positively say that I never saw him intoxicated in my life, ever.

Q. Did you ever see your father in a condition from drinking alcohol where he would be high or couldn't walk straight? A. Never.

Q. Or couldn't talk coherently?

A. Never.

Q. Or what you would call drunk?

A. Never.

Q. Or intoxicated?

A. Never, no. [418]

Q. Did you ever hear your mother, your sister, yourself—did you ever have reason to complain to your father about his drinking? A. No.

Mr. Angell: I think that is all, then.

The Court: Take the recess.

(Short recess taken.)

CHARLOTTE H. GUSTAFSON

recalled as a witness on behalf of the plaintiff; previously sworn.

Cross-Examination

Mr. Clausen: Q. As I understand your testimony, Mrs. Gustafson, on the 22nd of February of last year you were not at the house.

A. I was not.

(Testimony of Charlotte H. Gustafson.)

Q. And, as a matter of fact, you never had lived at this house?

A. I had never lived at this house.

Q. When was it that you saw—I believe you said two guns in the storage room?

A. When was it?

Q. Yes.

A. Whenever I would go to wash. I believe I indicated how I hung my laundry, so that I was facing into that northwest corner or northwest part of the room, and I had a chance to [419] observe then when I was washing, when I was down there to iron.

Q. When was it that you observed the guns in this storage room to which I am pointing here (indicating)?

A. I have never seen guns in that storage room.

Q. Well, didn't I understand your testimony that after——

A. After daddy's death I believe I saw them.

Q. My question now, Mrs. Gustafson, when that was.

A. Oh, a day afterwards.

Q. All right. That would be February 23, 1954?

A. Yes.

Q. By the way, what kind of guns were they that you saw in this storage room to which I am pointing here (indicating)?

A. They were long ones, either rifles or shotguns—not pistols.

Q. Either rifles or shotguns?

(Testimony of Charlotte H. Gustafson.)

A. That is what I said.

Q. All right. Now, would you please come to the blackboard for me?

You mentioned that you had, before the death of your father, before the 22nd of February, last year, seen ammunition on a bookcase?

A. Yes, sir.

Q. Would you point to that bookcase?

A. (Indicating) There.

Q. I will mark that G-1 (counsel designating on Plaintiff's [420] Exhibit 1).

And so there is no question about it, will you point to the storage room where you saw the guns on February 23, 1954?

A. (Witness designating.)

Q. I will mark that G-2.

(Counsel designating G-2 on Plaintiff's Exhibit 1.)

That is all I have. Thank you.

Mr. Angell: No further questions.

(Witness excused.)

LEROY HANSCOM

called as a witness on behalf of the plaintiff; sworn.

The Court: What is your name?

A. Leroy Hanscom.

The Court: Spell the last name.

A. H-a-n-s-c-o-m.

The Court: Where do you reside?

A. 66 Domingo Avenue, Berkeley.

The Court: Your business or occupation?

(Testimony of Leroy Hanscom.)

A. I am an attorney at law.

The Court: How long have you been so engaged?

A. Some twenty-five or thirty years, your Honor.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. You are one of the partners of Mellin, [421] & Hanscom, are you not?

A. I am, sir.

Q. You specialize in patent law?

A. I do.

Q. You have been a member of the bar of California for approximately twenty-five years, is that right?

A. No, approximately twelve or thirteen years.

Q. And you were practicing patent law before that?

A. Right.

Q. You knew Mr. Houston in his lifetime?

A. I did.

Q. When and where did you first meet Mr. Houston?

A. As I recall it, I met him at one of the Berkeley municipal camps, oh, some eight or nine years ago.

Q. And then did you become friends at that time or some time later?

A. Our friendship started at that time. The family was there, including Mrs. Spaulding.

Q. Mrs. Spaulding is who?

A. Mrs. Spaulding is Mrs. Houston's—Mrs. Clayton's mother.

(Testimony of Leroy Hanscom.)

Q. And that friendship kept up over the years until his death? A. It did.

Q. And would your family visit at the Houstons' and the [422] Houstons visit at your house?

A. Very frequently.

Q. Did you attend social functions with the Houston family?

A. Yes. We belonged to—aside from exchanging of dinners at each others' homes, we belonged to a dancing club.

Q. And what kind of a dancing club was that?

A. Well, primarily for folk dancing.

Q. Neighborhood affairs, friends in the area around Berkeley? A. That's right.

Q. And people who have been friends for many years, is that right? A. Right.

Q. Did you have Mr. and Mrs. Houston to your home for dinner on the Sunday night of February 21, 1954? A. We did.

Q. And what time did they come?

A. My recollection is that they came about six or six-thirty.

Q. What time did they go home?

A. About eleven o'clock.

Q. And did you have any drinks that night?

A. We did.

Q. How many? [423]

A. I would say two drinks before dinner.

Q. Before dinner. Any after?

A. None after.

Q. Did you observe Mr. Houston that evening

(Testimony of Leroy Hanscom.)

as to whether he was in good or bad spirits, whether he seemed depressed or happy, jovial?

A. My recollection is that he was his usual jovial self.

Q. Did he join the conversation with those present? A. Certainly.

Q. Was there joking going on in that conversation—laughing?

A. Yes. I recall that we ribbed each other about our neckties, which finally resulted in our exchanging neckties.

Q. You took his and he took yours?

A. That's right. And I think I had gotten trifocal glasses and we had a little discussion about that because he wore the same kind of glasses and they were somewhat new to me at that time.

Q. Did you notice any difference in Mr. Houston's action or demeanor or speech which was any different than at other or previous occasions that you had been with him, on social occasions?

A. Not a particle.

Q. Now, over the years that you have known Mr. Houston, from time to time have you been places where Mr. Houston was drinking? [424]

A. In my home and in his home.

Q. Will you just tell the court in your own words about the extent of drinking, on those occasions when you were present and you saw?

A. Well, in my home it was the usual practice to ask a guest if they wanted a cocktail, a drink of any kind, and we would have one round, and if

(Testimony of Leroy Hanscom.)

any of them wanted to they would feel free to take it. That would be about the extent of it there.

In the Houston home about the same thing occurred. I know they oftentimes preferred beer to whisky. As a matter of fact, I distinctly recall that we celebrated the two preceding New Year's with them and when the whistles blew at midnight, why, it was a can of beer that we celebrated with.

Q. Have you at any time ever seen Mr. Houston intoxicated?

A. I have never seen him intoxicated.

Q. Have you ever at any time in your long acquaintance with him ever seen Mr. Houston under the influence of alcohol to the point where he was not coherent and entirely clear in his speech?

A. I have never seen him where—even when he has had a drink or two—that it seemed to make a particle of difference to him.

Q. Will you describe Mr. Houston's disposition, to the court, just as you observed him, as to what kind of a man he [425] was?

A. Well, Mr. Houston was a very vigorous sort of man, a very genial—for example, when he greeted you you had no misgivings that you had been properly greeted. I don't think as far as I know, there was ever any fluctuation—he always seemed to be of an even temperament and always very jovial and congenial.

Q. Was he a nervous type of individual?

A. I wouldn't consider him so, no.

Q. You say he was a happy personality?

(Testimony of Leroy Hanscom.)

A. Decidedly so.

Q. Enjoyed talking politics?

A. He enjoyed doing anything. He enjoyed living.

Q. Sports? A. Particularly sports.

Q. Active in his church?

A. Yes, he was.

Q. You observed Mr. Houston in his home life?

A. Certainly.

Q. Did you ever observe any discordant note in the family?

A. On the contrary, he was always—had a very affectionate nature toward both his wife and two daughters.

Q. All the years you knew Mr. Houston did you ever hear him make any statement whatsoever that he was going to take his own life or that he would commit suicide? [426] A. Never.

Q. Incidentally, was Mr. Houston given to jokes, playing jokes?

A. Well, as represented by the little mutual ribbing, exchanging our ties, things of that kind; I wouldn't call him a practical joker by habit.

Q. Had you ever been on any hunting or fishing trips with him? A. No.

Q. You are not a hunter, I take it.

A. I am not.

Mr. Angell: That is all.

(Testimony of Leroy Hanscom.)

Cross Examination

Mr. Clausen: Q. Mr. Hanscom, as I understand it, you have been a friend of the Houston and Clayton family then for some time?

A. I have.

Q. As a friend, when did you first learn of the shooting which occurred on Washington's Birthday last year? A. The day that it occurred.

Q. And can you tell me about when, the time of the day you heard that?

A. I think it was in the middle of the afternoon.

Q. About——

A. Three o'clock—well, I couldn't say that. [427]

Q. Well, is that your best estimate?

A. No, I would say it was nearer five. I learned of it through my older son.

Q. And did you at that——. You got the report from your boy, did you? A. I did.

Q. And was that the boy who is married now to one of the daughters of Mr. Houston?

A. He is.

Q. And did you assist in getting for the family an attorney? A. I did.

Q. And was that done on that very day?

A. No.

Q. When?

A. Well, Mrs. Houston's two brothers immediately came out from Colorado. They visited me I would imagine at my office; so it must have been the following Tuesday, Monday being a holiday.

(Testimony of Leroy Hanscom.)

Q. In other words, the day after the shooting, is that correct?

A. I would place it at that, yes.

Q. At that time did you have a conference with Mr. Angell? A. I think it was that day.

Q. Was Mrs. Houston present?

A. I don't think Mrs. Houston was present. [428]

Q. And was this done at the request of Mrs. Houston?

A. What was done at the request of Mrs. Houston?

Q. Your talk with Mr. Angell.

A. Well, I think that her two brothers, after conferring with me and after I had suggested that Mr. Angell be employed to handle whatever legal matters were required, and the two brothers conferred with Mrs. Houston, and as a result of that conference then we met with Mr. Angell.

Q. And you say "we met with Mr. Angell"; that was yourself, Mrs. Houston and Mr. Angell?

A. I was present. Maybe Mrs. Houston was present.

Q. Your recommendation then of Mr. Angell was on February 23, 1954, and this was conveyed to the two brothers of Mrs. Houston?

A. Well, my recommendation was conveyed to the two brothers of Mrs. Houston prior to the time of Mrs. Houston consenting—acquiescing to my recommendation.

Q. And your recommendation then was—and

(Testimony of Leroy Hanscom.)

the consent for the employment of Mr. Angell—was that all in the same day?

A. I don't recall. It had to be done in a rather short time because the boys had left their business in Colorado and they had to get back to it, so things were done rather promptly.

Q. Well, is it your recollection then that [429] this was all done on the same day following the death?

A. I don't know whether it was done the same day or whether it was done in two days.

Q. Well, you put it within two days, would you?

A. I would say that is my best recollection, yes.

Q. Within that time did you have a talk yourself with Mr. Angell? A. Oh, undoubtedly.

Q. Did Mrs. Houston? A. Yes.

Q. Now, did you also assist in—. You discussed, did you, the insurance features of this case?

A. Well, I knew nothing of the insurance features of the case until some time later.

Q. You left that to Mr. Angell? A. Yes.

Q. And did you do anything in assisting Mrs. Houston or the family in the employment, in addition to the attorney, of any investigator?

A. No, I had nothing to do with that.

Q. Anything in reference to the Coroner or the Coroner's Office or any of the Coroner's deputies? A. No.

Q. Or in reference to any of the police or the police officers or the police department of Berkeley? [430] A. No.

Mr. Clausen: That is all.

(Witness excused.)

DONALD C. CAMPBELL

called as a witness on behalf of the plaintiff; sworn.

The Court: Your full name, please?

A. Donald Charles Campbell.

The Court: Where do you reside?

A. 239 University Avenue, Davis, California.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. Where do you reside?

A. 239 University Avenue, Davis, California.

Q. What is your business or occupation?

A. I am employed by the Department of Agriculture, University of California, and I am also a student at the University of California at Davis.

Q. Do you know the Houstons? A. I do.

Q. You knew Mr. Houston during his lifetime?

A. Very well.

Q. How long had you known the family?

A. I have known Mr. Houston since about 1947.

Q. What was the occasion of your meeting him?

A. I met him through his daughter Ann Houston. [431]

Q. Which one? A. Ann Houston.

Q. And how did you come to know the daughter? Did you go there to see the daughter?

A. I met him—he took quite a few couples to a party down at Half Moon Bay on Ann's birthday in the spring of 1947.

(Testimony of Donald C. Campbell.)

Q. That is when you were in junior high school?

A. Junior high school.

Q. At Berkeley? A. At Berkeley.

Q. And Mr. Houston took this little group down for Ann's birthday, is that right?

A. Yes, that's right.

Q. Just as briefly, and as quickly as you can, how close were you to Mr. Houston, to the Houston family, in the years that ensued from 1947 up to the death of Mr. Houston?

A. Well, I considered myself practically a son of Mr. Houston and we were very close together.

Q. Did you spend a great deal of time together?

A. Yes, practically all the time that we had free.

Q. Did you have a father?

A. No, my father was deceased.

Q. And so you went with Mr. Houston a great deal, is that correct? A. Absolutely. [432]

Q. You regarded him as a father?

A. Absolutely.

Q. Now, did you hunt with Mr. Houston?

A. Practically every trip. He never made a hunting trip without me unless it was absolutely impossible that I could get away from school or something else. We were—I usually could get excused, though.

Q. And over what period of time was that, Donald?

A. Well, it started in 19—in the summer of 1947. Mr. Houston came up to where I was run-

(Testimony of Donald C. Campbell.)

ning—I had a—I worked as a packer, and I went in with Mr. Houston that summer on a pack trip for about a week. He rented some horses from my company, the company I was employed by.

Q. This association extended over what period?

A. How do you mean, sir?

Q. Well, you said you first met him in 1947. How long did this continue?

A. Up until I was shipped overseas—I was in the service, and I was overseas in 1953, the spring of 1953, I think it was.

Q. And then did you not return—you did not return until after Mr. Houston's death, is that correct?

A. Yes, that is correct.

Q. When did you go into the army?

A. I went into the army November 3, 1952. [433]

Q. And were you stationed around here from 1952 until you went overseas in the spring?

A. Yes. I was stationed at San Luis Obispo, but I was home weekends.

Q. While you were in the army—was it the army you were in?

A. Yes, sir.

Q. What part of the service?

A. I was in the Signal Corps.

Q. Signal Corps?

A. Yes.

Q. And would you come up and make hunting trips with Mr. Houston?

A. Every weekend I made it home, one way or the other.

Q. Did you ever bring any boys up with you?

A. Well, once in a while, yes.

(Testimony of Donald C. Campbell.)

Q. And where would you go to hunt over these years, will you just tell us briefly, the area you and Mr. Houston hunted in during the time you were hunting with him?

A. Over the number of years that I knew him?

Q. Yes.

A. It included quite a territory. He took me first on a trip back to Montana where we went up through Oregon, Washington and proceeded over to Montana, and we hunted in a number of the States that we went through. It was a combined business and pleasure trip, it was to bring better relations between [434] his associates and the company or who represented his company, which at that time was the Fire Association, and we went back to take some of these men on a trip in Montana. This trip was—well, we had persons like the Senator of Utah and a number of other people with us on this trip.

Q. Well, now, just tell us, first, the territory you covered. You covered Montana?

A. Yes, Montana, all—quite a bit of California, Oregon and we had a trip in Nevada, and, well, I think that covers the States, but that includes quite a number of trips.

Q. And did you ever have any trips, hunting or fishing, when officers or directors of the New Zealand Insurance Company were along?

A. Absolutely. We certainly did. We had the United States—not the the United States—the world manager or the New Zealand Company

(Testimony of Donald C. Campbell.)

world manager, who was here in 1948, and went on numerous weekend trips with Mr. Houston and Ann Houston at that time and myself. We went out on horseback trips out on the other side of Walnut Creek, and in 1949 when Mr. O'Brien returned we continued our friendship out there because he really enjoyed it; it was a new experience for him, he had never been—he had never ridden a horse before that time, and he thought it quite an honor that he could learn to ride.

Q. What is Mr. O'Brien's position in the New Zealand company?

A. He is the world manager for the New Zealand Insurance [435] Company.

Q. And what about Sir James?

A. Sir James?

Q. Did you meet Sir James?

A. Sir James Gunson. He at that time was our board of directors chairman—he was here in 1952, I believe it was, and he took a trip with Mr. Houston, Mr. Wilkes and Mr. Wilkes' son and myself to Oregon. We went up there early in the spring on a fishing trip and we had quite a time getting Mr.—Sir James, who was an elderly man—we had to ferry him across this stream.

Q. How old was he, Mr. Campbell? You said an elderly man.

A. He was in his seventies.

Q. He was in his seventies.

A. But an active man. He liked that kind of a life.

(Testimony of Donald C. Campbell.)

The Court: Life begins at 80.

Mr. Angell: That's right, Your Honor.

Q. Was there anything unusual that happened on that occasion that seemed to have any interest to Sir James?

A. Well, I think that the main interest to Sir James was getting ferried across this stream to Mr. Harry Utley's cabin. Mr. Houston and I had to take off our clothes and paddle—swim alongside of the canoe to get him across to the cabin because it was quite a treacherous stream and he got quite a—well, quite a lot of enjoyment out of it. [436] He thought that was quite a thing to be able to do.

Q. And Sir James is from New Zealand, is he not?

A. Yes he is.

Q. And did Sir James on that occasion make any comment to you or was there anything you heard regarding what he thought of Mr. Houston?

A. Yes, he——

Mr. Clausen: Well, Your Honor, we object to that as hearsay and far afield.

The Court: Objection sustained.

Mr. Angell: Well, if Your Honor please, the purpose of offering this is that counsel has tried by every innuendo and inference here, by putting in documents here, which I think are clearly inadmissible, under the guise that it shows something to worry about, to show in some way that the relationship between the New Zealand home office and Mr. Houston was in such a condition that he was worried about it.

(Testimony of Donald C. Campbell.)

The Court: It hasn't registered in my mind as yet.

Mr. Angell: Beg your pardon?

The Court: It hasn't registered in my mind.

Mr. Angell: All right, Your Honor.

Q. Now, on these various trips that you would take, in all the time that you were with Mr. Houston, did you have an opportunity, and did you, Mr. Campbell, observe Mr. Houston's nature, his actions? [437]

A. By all means, I certainly did.

Q. Now, would you say that Mr. Houston was ordinarily a happy man who enjoyed life?

A. He enjoyed it more than anybody I have ever met before or since.

Q. Did you ever hear Mr. Houston at any time or any place mention anything about taking his own life?

A. Why, absolutely not.

Q. You saw Mr. Houston's drinking habits, did you not?

A. Yes, I certainly did.

Q. And will you just tell the Court in your own words what you saw as to Mr. Houston's drinking habits and on these various trips and hunting, when you were with him socially, just what you observed.

A. Well, he would have a drink with everybody else and along with everybody else, but by no means, he was not an alcoholic by any way that you could picture him. He was—he just was a social—would drink right along with the crowd and very—and up to a certain point, and he would cut off. He had a big responsibility and we were with business

(Testimony of Donald C. Campbell.)

men under him on practically on all trips and he couldn't afford to——

Mr. Clausen: Your Honor, we will ask the last part go out.

Mr. Angell: We have no objection to it going out. [438]

The Court: What he could afford to or not to do may go out.

Mr. Angell: Q. Did you ever see Mr. Houston on any of these trips under the influence of liquor?

A. By no means.

Q. And did you ever see him when he was unsteady on his feet or incoherent in his speech?

A. Why, certainly not.

Q. Did you ever see him when he couldn't drive his car with safety?

A. Why, I wouldn't go out with him if I thought that it was unsafe.

Q. Did he usually do the driving?

A. Well, we took turns.

Q. You took turns? A. Yes.

Q. Now, you heard one of the witnesses here testify or heard a deposition read that on one occasion Mr. Houston went into Mr. Harry Utley's office and discharged a firearm and said something about shooting an ear off a deer; do you recall that testimony? A. I do.

Q. Were you with Mr. Houston on the occasion when a firearm was discharged in Mr. Utley's office? A. I do, and I would like to state——

Q. Just state——

(Testimony of Donald C. Campbell.)

A. —something about that time. If I may. At that time he had—we had these blank 22 shells—

Mr. Clausen: Your Honor, I don't know what the witness is going to state—it is a voluntary statement. I think he should—

Mr. Angell: I have asked him—

Mr. Clausen: It should be by question and answer.

The Court: Ask the question.

Mr. Angell: Q. Were you ever present when Mr. Houston discharged a firearm in Mr. Utley's office? A. Yes.

Q. And what kind of a firearm was that?

A. The firearm was a 22 pistol with blank cartridges. May I add—

Q. And at that time did Mr. Houston aim at the deer and pull the trigger?

A. Yes. And may I state something else about that?

Q. If it is explanatory of that incident.

Mr. Clausen: I think, Your Honor, if the witness is going to state something, he should be asked the question.

Mr. Angell: I don't know what he wants to state.

The Court: If he wants to explain, he may. He may explain.

Mr. Clausen: I didn't so understand. [440]

The Court: Did you say that you wanted to explain something? A. Yes, sir, Your Honor.

The Court: Well, explain.

(Testimony of Donald C. Campbell.)

A. Something of that nature in that town is certainly not of order, in a small community such as Lakeview, and by no means anybody would think anything, that that was really out of order or anything for somebody to do that——

Mr. Angell: Q. Well, you mean——

A. ——such a state as that.

Mr. Angell: I have no objection. I have no objection to it going out.

Mr. Clausen: May that go out, Your Honor?

The Court: It may.

Mr. Angell: No objection.

Q. Did Mr. Houston sometimes carry blank cartridges, which he discharged for——

A. Yes, we did.

Q. What was the purpose of that? For fun or was it—Did it have some purpose, if you know?

A. No purpose. That was no purpose of harmful effect, that's——

Q. You observed Mr. Houston's manner of dress as he went on these trips with you, did you not?

A. Yes, I did.

Q. Did you see anything different in his manner of dress than [441] other people of that locality? A. Why, certainly not.

Q. Did you ever see him with a coonskin cap?

A. He never had a coonskin cap in his life that I know of.

Q. Do you regard or describe Mr. Houston as a clown?

A. Not as a clown as such. He liked to be able

(Testimony of Donald C. Campbell.)

to express himself, but he wasn't—he wouldn't clown around. He was a very vigorous man, but he wasn't a clown, by no means.

Q. He has been described by Mrs. Wilderson, one of the the witnesses—I believe it was Mrs. Pearson—Mrs. Pearson, the waitress, as a “big shot.”

Did you ever see Mr. Houston conduct himself as what you would say is a big shot?

A. Possibly to an introvert or something, that he would appear to be a big shot, but I never had that occasion to be able to call him a big shot.

Q. And, incidentally, was Mr. Houston a pretty good sportsman?

A. By me—in my classification, he was the best I have ever hunted with or fished with or rode with or roped with or any such thing as that.

Q. Was he an excellent shot?

A. Absolutely a perfect shot.

Q. A vigorous hiker?

A. He certainly was. He could outhike me. [442]

Q. He was a vigorous hiker and active?

A. Active in everything he undertook.

Q. Did you ever hear him complain about being sick or feeling bad?

A. Why, certainly not. He did have a sinus trouble and he used—it used to bother him when we were out riding and there was quite a bit of dust, but—when we were driving cattle or horses or such as that—but, other than that, he would wear a bandanna to protect his nostrils—but other than that he

(Testimony of Donald C. Campbell.)

never had any. He possibly had a football knee, he called it, that would swell up a little when we would hike-hunt all day or fish or such as that.

Q. Could he do a pretty good job of hunting and fishing all day?

A. He prided himself on being good at such things and he coached me so I would be right up there with him, so that nobody could outdo us. We were—he liked to see us be able to catch more fish or such as that.

Q. I will show you what purports to be a letter on the letterhead of William M. Houston, dated December 22, 1953.

Mr. Clausen: Just a moment.

Mr. Angell: Let me identify it first, for the record.

Mr. Clausen: We will object to the letter, your Honor. It is just apparently a social letter from Mr. Houston to this witness. We object on the ground that it is hearsay, [443] no bearing on any issue in the case, far afield, merely a social letter.

Mr. Angell: Unless I can get it identified, your Honor, and give it to your Honor to see what it is, why, it is kind of address ourselves to it.

Q. Did you ever see this letter before?

A. Yes, I did.

Q. You gave that to me, did you not?

A. I did.

Q. Did you receive that in the usual course of mail? A. How do you mean by——?

Q. Was it sent to you?

(Testimony of Donald C. Campbell.)

A. Yes, it was sent to me.

Q. Where were you when you received it?

A. I was overseas in Japan at the time.

Q. Do you recognize the handwriting?

A. I certainly do.

Q. Whose is it?

A. It is Mr. William M. Houston's.

Q. This was a letter written by Mr. Houston to you, and it is signed at the bottom "Bill." Is that the way Mr. Houston usually addressed—signed his letters?

A. Yes, sir.

Mr. Angell: I will ask that it be marked for identification. [444]

The Court: Let it be admitted and marked for the purposes of identification.

The Clerk: Plaintiff's Exhibit 9 marked for identification.

(Handwritten letter dated 12/22/53, William M. Houston, to "Dear Don," marked for identification Plaintiff's Exhibit No. 9.)

Mr. Angell: I now offer this in evidence, your Honor. And the purpose of this offer is addressed to the state of mind of Mr. Houston just prior to the date of his death or within a reasonable time thereof, to show that at least at this time Mr. Houston was not contemplating self-destruction.

Mr. Clausen: What is the date, counsel?

Mr. Angell: December 22, 1953, just two months before.

Mr. Clausen: We make the objection, your Honor, that I just urged.

(Testimony of Donald C. Campbell.)

The Court: For the limited purpose of the offer, I will allow it. Objection overruled.

Mr. Angell: I offer it in evidence as Plaintiff's Exhibit 9.

The Clerk: Plaintiff's Exhibit 9 admitted and filed in evidence.

(Whereupon Plaintiff's Exhibit No. 9 for identification was received in evidence.)

Mr. Angell: I would like to read this, your Honor, into [445] the record: (Reading)

"Dear Don:

"Please forgive me, old boy, for my too long delay in again writing you. Charlotte and I have just returned from New York. We were in time to attend"——

Q. I think maybe you better read it, if you can,— I think you can do a better job than I can because I can't read handwriting.

A. (Reading)

"Dear Don:

"Please forgive me, old boy, for my too long delay in again writing you. Charlotte and I have just returned from New York. We were in time to attend Barbara's wedding."

My sister.

"She was beautiful. Edward is a fine fellow and a clean-cut, good-looking chap. Your mother was just as pretty as Barbara.

"Don, accept this letter as a merchandise money order for a 12 gauge shot gun to be bought and given

(Testimony of Donald C. Campbell.)

you on your return. This is your Christmas present. I haven't opened my box yet from you.

"Merry Xmas. Bill."

Mr. Angell: Now I will offer another letter, on the stationery of New Zealand Insurance Company, Ltd., dated [446] January 22, 1954, just a month before Mr. Houston's death, and it purports to be a letter from Mr. Houston to the witness.

Q. I will ask you if you received that letter.

A. This is the one I received.

Q. And you gave it to me? A. I did.

Mr. Angell: The same purpose of the offer as here is to show the state of mind of Mr. Houston on the date the letter was written. I will offer it as Plaintiff's Exhibit 10.

Mr. Clausen: Same objection, your Honor, as I made immediately prior to the prior offer.

The Court: What is the date of this letter?

Mr. Angell: Just a month before Mr. Houston's death.

The Court: For the limited purpose, I will allow it. Objection overruled.

The Clerk: Plaintiff's Exhibit 10 admitted and filed in evidence.

(Whereupon letter dated January 22, 1954 was received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Angell: (Reading)

"Dear Don:

"As usual I am awfully slow in answering and [447] catching up with my personal correspondence,

(Testimony of Donald C. Campbell.)

what with this being the end of the year and our efforts to get out our Annual Statements. First off, that fly rod which you sent me looks to be a dandy, it's properly balanced, light weight and I'm sure it will work first class. Thanks a million, I do appreciate your thoughtfulness and also thank your pal, Cliff Hawkins, for dispatching it to me in your behalf.

Now for some news. Harry Utleigh was remarried on New Year's Day, January 1st, to Mrs. Irma Claus. Mrs. Claus is 55 years old, a widow of 12 years, has two married children, one son and one daughter, and about ten grandchildren. She owns a ranch or two in Lake County and also owns six or eight of the big rental producing buildings in Lakeview. So she has her money and Harry has his and we know they did marry for companionship. Honestly though, Don, they act like a couple of sixteen year old kids, they are so much in love and are having so much fun. They were married here in San Francisco and Charlotte and I attended the wedding. Ralph and Mrs. Renner, Harry and his new Wife, Irma, will be leaving for Mexico, Lima, Peru, Argentina, Brazil and back here to California through the Panama Canal in about ten days or two weeks. Ralph and Jane Renner were in town yesterday and I talked to them on the telephone. [448] All of them are greatly excited at the prospect of a trip to South America and of course they always ask me about you and when you're going to get home. Irma inquired about getting one of those Japanese fly rods

(Testimony of Donald C. Campbell.)

for herself so Harry asked me to ask you if you could get hold of one and ship it over and he will see that you are reimbursed for the cost. If you do have the time and can make it, it would be nice if you would send one of those Jap fly rods to Mrs. Harry A. Utley in Lakeview, Oregon, it should arrive sometime before they get back from their South America trip.

"I never did get to New Zealand last year as was anticipated but Charlotte and I did take a trip to New York and as I think I told you in my last letter and got back just in time to attend Barbara's wedding. I haven't seen your family for quite some time and intend to drop by there early one morning for a visit so of course I can't give you any news. I saw your granddaddy at the wedding and he sure did look fine, and he was sure proud of Barbara and her new husband.

"Don, I appreciate the pictures which you sent me, particularly the one with you behind the machine gun on the back of which you had written "deer hunting". Well next fall you should be able to get in some deer hunting, goose hunting and duck hunting, and, believe [449] you me, I am looking forward to it as I know you are. Best of luck, and boy will I be glad when you get home.

"Sincerely, Bill."

Down at the bottom of the letter is a postscript:

"I saw your mother, grandmother, Barb and Rick last Saturday morning. They are all well. We went through all your pictures and had fun."

(Testimony of Donald C. Campbell.)

Q. Did Mr. Houston contemplate taking you into any business with him at any time, Mr. Campbell?

A. He did that.

Q. And what business?

A. He wanted me to take over the ranches in Oregon for him as soon as I was back from the service.

Q. Will you briefly describe for the Court and for the record those ranches?

A. Well, there was two of them on Goose Lake near Lakeview, Oregon. One of them was pertaining mostly to raising grain and alfalfa.

Q. How many acres on that one?

A. It was—golly, I don't remember.

Q. Briefly,—if you don't, why,—

A. Somewhere around 500 acres, I would say.

Q. Yes. Now, what about the other one?

A. Well, the other one was about half—about half of it was put into permanent pasture and the other half was rough [450] grazing land, and it was not quite as large—it was around 400 and some acres, something to that effect.

Q. Now, you were studying at Davis or contemplating studying to go into that business, were you not?

A. I had been before I went into the service.

Q. Now, I will show you a dictionary which seems to be of an old vintage, and it was printed in 1948, so it's not as old as it looks to me, and down the fly leaf of which is—there's a handwriting and

(Testimony of Donald C. Campbell.)

signed "Bill." And I will ask you if that fly leaf was attached when you first saw it.

A. Yes, it was part of the book when I first got it.

Q. What was the occasion of your getting this book?

A. Mr. Houston didn't like the way I spelt.

Q. He didn't like the way you spelled?

A. He didn't like the spelling in my letters, so he sent me this book when I was in Japan.

Q. He sent it——

A. He sent the book to me in Japan.

Q. And was this inscription on the sheet which is attached there now?

A. Yes. That broke out during the process of coming—shipping home from Japan.

Mr. Angell: Offer the inscription, your Honor, as Plaintiff's Exhibit next in order for the same purpose, to merely show a state of mind at or about the time or close [451] enough to it to show a state of mind of Mr. Houston. I wish the record to show that this was sent to the witness within a very few days of the time the policy of insurance was to take—the application was filed.

Mr. Clausen: Well, we will object, if the Court please, on the same ground as the other two offers.

The Court: Let the record so show. It will be admitted and marked.

The Clerk: Plaintiff's Exhibit 11 admitted and filed in evidence.

(Testimony of Donald C. Campbell.)

(Whereupon inscription was received in evidence and marked Plaintiff's Exhibit No. 11.)

Mr. Angell: This is short and I will read it into the record. It says:

"To my Pard Pal and Associate "to be" in the ranch and livestock business in Lake County, Oregon. Faithfully. (Signed) William M. Houston, Friday, September 25, 1953—your mother's 42nd birthday. Bill."

Mr. Angell: Q. Were you ever at the Houston home in the years that you knew Mr. Houston?

A. Many, many times.

Q. Were you ever down in the basement, in the area shown on this Plaintiff's Exhibit 1 which is the exhibit on the board? [452]

A. I was, certainly.

Q. And when did you first become familiar with that basement?

A. When they first got the house, was the first time.

Q. And were you in there many, many times after? A. I certainly was.

Q. And what was the occasion when you would be down in that basement?

A. Well, I kept a lot of my equipment down there with Bill. When we came back from trips sometimes I would leave my stuff at his house instead of bringing it down to my place.

Q. You are not married, are you?

A. No, I am not.

Q. Where do you live?

(Testimony of Donald C. Campbell.)

A. With my mother, when I am at home here.

Q. Would you store some of your sport equipment and hunting, fishing gear in this basement?

A. By all means.

Q. Are you familiar or were you familiar with the conditions and the objects in that basement at or about the time referred to, 1954?

A. No, not——. I was when — before I was shipped overseas in the service. Up until that time. That was—I said, I think, the spring of 1953. So I was up until that time.

Q. So your knowledge of what was in there would have been [453] prior to this spring?

A. Yes, it would.

Q. The spring of 1953. Well, now, taking it now as of the time that you knew it, just describe generally what that basement was used for.

Mr. Clausen: Object to that as being too remote in time. The witness wasn't in the country after the spring of 1953.

Mr. Angell: I think I can easily show there was no change between that time and up to the date——

The Court: It is rather remote.

Mr. Angell: It is remote as to time, but also that only goes to its materiality and certainly not as to its admissibility. The thing should—the thing I am trying to show through this witness—. Every other witness has testified to the same thing, and that's all I am trying to show.

The Court: I will sustain the objection.

Mr. Angell: All right.

(Testimony of Donald C. Campbell.)

Q. At such times as you hunted with Mr. Houston, do you know of your knowledge as to Mr. Houston's habits, whether he left his guns loaded or unloaded when he was not using them?

A. Well, it was a practice of Mr. Houston——

Mr. Clausen: We will object to that, if the Court please, on the same ground: too remote in point of time. Also, your Honor, there is no relation to the situation here of 1954. [454]

Mr. Angell: Speaking of habit——

Mr. Clausen: Speaking of hunting trips is different and the point of time is different. The witness wasn't in the country since the spring of '53.

Mr. Angell: This would be his habits up until that time.

The Court: Lay the foundation for this question.

Mr. Angell: Q. You went on hunting trips clear from '47 up to the spring of '53, when you left, is that right? A. I did.

Q. Did you observe Mr. Houston's habit with respect to leaving his guns or whether he took his shells out when he finished using his guns, his firearms? A. Yes, I did.

Q. Did you on any occasions ever see the guns left loaded when they were put away?

A. I did that.

Mr. Clausen: Pardon me. Just a moment. Same objection, your Honor: too remote.

The Court: Fix the time.

Mr. Angell: Q. When did you see that?

A. Many times in our——

(Testimony of Donald C. Campbell.)

Mr. Angell: Q. Just through what period of time did you see it and how many times?

A. Well, over the number of years we would—I observed it [455] through all my trips and stuff. I had certainly observed whether the guns were loaded or not. It was a safe—we were—had a safety factor in it——. I mean, he taught me to handle guns. I should know what his habits were.

Q. Well, do you know what his habits were?

A. I certainly do.

Q. What were they with respect to leaving guns loaded?

Mr. Clausen: May I ask the Court for the time to be fixed?

Mr. Angell: He fixed it over the whole time: '47 until he left in '53.

Mr. Clausen: I would assume that what would be the critical question would be when was the last time that he saw this practice.

Mr. Angell: Q. Do you want to answer that question or can you answer it?

A. Yes, certainly I can. The last time that I went on a hunting trip with Mr. Houston was—I can't fix the exact date, but it was just prior—before I went overseas in the spring of '53. We went out——

Mr. Clausen: That is, I believe, an answer to the question.

Mr. Angell: He is going to tell where he went.

Mr. Clausen: I understand. Your Honor, my objection is that it is too remote and it takes us into areas and places [456] on cross examination and

(Testimony of Donald C. Campbell.)

lengthy inquiries that, with all respect, don't help us on the critical question on the case.

The Court: There is considerable testimony in relation to the condition of these guns. I think it goes to the weight of the testimony. I will allow it. Objection will be overruled.

A. Would you repeat the question, please?

Mr. Angell: Q. The question is, do you know the habits of Mr. Houston with respect to whether he kept his guns loaded or unloaded when he was not using them? A. Yes, I do.

Q. And what was that habit?

A. It was a practice of Mr. Houston to keep his guns loaded. Now, let me—can I explain that to a certain degree? We would—he would always tell me that every gun was loaded. Possibly sometimes we wouldn't keep them—some of them wouldn't be loaded, but practically all the time you would find shells in our—in the chamber—not in the chamber but in the magazine of the guns.

The Court: Why did he do that?

A. We——. I have no idea. We were careful with guns. He taught me to be careful with guns. But he gave me the respect that all guns were loaded at all times, to treat them as such.

The Court: All right. [457]

Mr. Angell: Q. Now, did you see where guns were kept around the house, up at least until the time you went away in the spring of '53?

A. Yes, because I kept my own guns there at times.

(Testimony of Donald C. Campbell.)

Q. Where were they kept at that time?

A. With respect to the basement there?

Q. Oh, yes. Well, yes.

A. Should I show on the chart or just tell?

Q. You can just state it from where you are, generally where. Did he have a place where he put them?

A. Well, the majority of the time we kept them in the area of that raised platform. Now, myself, I kept them in that far corner at some times, and sometimes I kept them in the scabbard of the—on the saddle, that was attached to the saddle. But most of the time it depended upon what the situation was. There was no set pattern at all.

Q. That is what I——. There was no set pattern?

A. No, absolutely. We had no particular pattern of how we kept our equipment. We just didn't keep up any particular spot for every item.

Q. Do you know whether Mr. Houston had a set habit of where he kept his ammunition?

A. By no means.

Q. You heard the testimony read in here the other day that up in the Oregon country Mr. Houston was known as Wild Bill [458] Hiccup. Do you know where that name came from and whether it was—whether Mr. Houston was ever known by that name?

A. I know the originator and the sole purpose of that name. It started by Virginia Wilkes—Wilkinson, the name is. She didn't call him that. She said in her testimony—she said that it was a nickname. But

(Testimony of Donald C. Campbell.)

by no means was it the nickname. She painted a little board with a horse kicking a man and she put this Wild Bill Hiccup on it and put it up on the—on Mr. Houston's cabin. But by no means, he wasn't known as Wild Bill Hiccup in that country.

Q. Did you ever hear him called by that name at all?

A. Absolutely not, and I was there to know.

Q. I think I have asked you this, whether you knew or whether you ever saw Mr. Houston wear a coonskin cap.

A. Yes, you asked me that and I said no.

Mr. Angell: Take the witness.

Mr. Clausen: Just one or two questions, Mr. Campbell. As I understand your testimony,—

The Court: I was about to adjourn. Do you think you could get through with this witness?

Mr. Clausen: I have two questions.

The Court: Proceed.

Cross Examination

Mr. Clausen: Q. Just on this matter of the gun being loaded. As I understand your testimony, it was that as a [459] safety feature he told you to treat guns as loaded even though, as you would find out on occasions, they would not be loaded as a matter of fact.

A. Well, many times they were loaded and sometimes they weren't. There was no set pattern to it.

Q. That's right: he told you to do that, to assume they were loaded as a safety feature?

(Testimony of Donald C. Campbell.)

A. Yes, I would say that.

Q. He was careful with guns, wasn't he?

A. Yes.

Mr. Clausen: That is all.

Mr. Angell: That is all.

The Court: Take the adjournment until 10:00 o'clock tomorrow morning.

(Whereupon an adjournment was taken to tomorrow, November 10, 1955, at 10:00 o'clock a.m.)

The Clerk: Houston v. Canada Life Assurance Company, further trial.

Mr. Angell: Ready, your Honor.

Mr. Clausen: Ready, your Honor.

Mr. Angell: Dr. Kirk.

PAUL L. KIRK

called as a witness on behalf of the plaintiff, sworn.

The Court: Your name, please.

A. Paul L. Kirk.

The Court: Where do you reside?

A. 1064 Creston Road, Berkeley, California.

The Court: Your business or your occupation?

A. I am professor of criminalistics in the University of California, and private consultant.

The Court: You are now associated with the University of California? A. I am.

The Court: For how long?

A. About 28 years.

The Court: Take the witness.

(Testimony of Paul L. Kirk.)

Direct Examination

Mr. Angell: Q. What is your business or profession, Dr. Kirk? [461]

A. I am professor of criminalistics, University of California. I have been at various times professor of biochemistry and criminalistics also, and at lower ranks in biochemistry.

Q. Have you done any work and familiarized yourself with ballistics? A. I have.

Q. As a part of your work.

A. I have taught——

Q. As a part of your work in criminal investigation.

A. I have taught the subject; I have investigated and I have testified in that field numerous times.

Q. And have you been an expert witness over many years last past?

A. About 20 years; I have testified as an expert in various matters.

Q. Just for the record and for your examination, can you state just a few cases in which you have been an expert witness, on particularly ballistics?

A. In the field of ballistics and firearms, investigation for army court martials in the Sixth Army C.I.D. at Fort Ord; I have testified in a number of accidental shootings; I have testified in several murder trials, including the Newson trial, which is well known in Alameda County. I can't recall all of them just at the moment, but I have testified in [462] numerous trials, numerous times.

(Testimony of Paul L. Kirk.)

Q. In numerous trials having to do with ballistics? A. That's correct.

Q. Were you employed in this case by myself, acting for Mrs. Houston, Dr. Kirk?

A. I was.

Q. Have you any record or recollection as to when, about, that was?

A. It was in the early half of March 1954.

Q. That was prior to the coroner's inquest, was it not? A. That is correct.

Q. And in connection with that employment, Doctor, did you visit the premises, the Houston home on Miller Street?

A. I did, on a number of occasions, yes.

Q. Have you a record of what the number of that house is? A. 1082 Miller Avenue.

Q. In Berkeley? A. In Berkeley, yes.

Q. Will you just state for the record the date that you went there?

A. I first went to the Houston home on March the 14th, 1954. I later returned on March the 19th and I was there briefly also on March the 24th—all in the same month, in 1954.

Q. While there, did you have occasion, in connection with your investigation, to go into the basement where the body [463] was found and the shot was fired, to observe the condition of that basement?

A. Yes, I examined the basement of that home on each occasion.

Q. And did you also examine the body?

(Testimony of Paul L. Kirk.)

A. I examined the body on March 17th in the Chapel of the Chimes, yes.

Q. The Chapel of the Chimes is in Oakland?

A. In Oakland, that's correct.

Q. On Piedmont Avenue?

A. Piedmont Avenue.

Q. Will you just step to the board, Dr. Kirk, and look at Plaintiff's Exhibit 1—which you have looked over briefly before you went on the stand, did you not?

A. That's correct, yes, sir.

Q. Will you, and as briefly as possible, describe the condition that you saw when you first went there?

A. Well, with respect to the chart on the board, the objects listed were all there, with the exception of the hole cut in the floor, which I cut myself on the 24th of March.

The bookcase, brooms and sweeper, bedding, chest, sofa—were all there.

In addition to that, there was, at the edge of the sofa, a trellis—that's one of these lath trellises such as you place in the garden for vines to climb on. [464]

There was also a lawn chair situated in front of the sofa and partially blocking the entrance to the back corner.

There were also some additional items in the front of the chest, notably some bedboards which were piled with the ends protruding somewhat into the passageway.

(Testimony of Paul L. Kirk.)

There was, at the time I saw the basement, a considerable number of items that are not shown in this chart, that is, in the particular area of the corner in which the shot was fired.

Q. Go ahead, Doctor.

A. That is my recollection, that nearly all the materials which I noticed that are not shown on here were in this area (indicating).

Now, on the righthand side, of course, there was a great amount of material piled here, which was not pertinent, which I did not make any record of nor pay any attention to.

There was a good more than shown in this corner.

Q. Did you take a photograph when you were there? A. I did.

Q. And I will show you Plaintiff's Exhibit 7 for identification and ask if that's the photograph you took.

A. Yes, this is a photograph which I took. It shows the lawn chair which blocks the entrance at a point below where this hole in floor is printed in the chart on the board.

It also shows, I believe, the bed—the boards are not shown. They might have been at the rear rather than in the [465] front. They certainly protruded here, I recall. They don't show in the photograph.

The other items here are about as shown, with the exception of the chair which is shown in this photograph.

Mr. Angell: Now, your Honor, I will offer Plain-

(Testimony of Paul L. Kirk.)

tiff's Exhibit 7 for identification in evidence as Plaintiff's Exhibit 7.

Mr. Clausen: To which we object, your Honor, on the ground, as the witness now testified, the picture does not depict what he saw. He just now explained some things were there and some things were not.

Furthermore, the witness did not see the scene on the date with which we are concerned, namely, February 22, 1954. Quite the contrary, as I understand from his testimony. He wasn't there until March the 14th for the first time.

For that reason, because the picture is not a true condition and furthermore, because it does not depict as of the time we are concerned with, we object, no proper foundation; we object to the photograph.

Mr. Angell: May I reply, your Honor, and my reply is just this, that the picture was shown to Mrs. Houston over the objection of counsel and Mrs. Houston said that it correctly depicted the things shown there on February 22, 1954, at the time Mr. Houston was shot in that basement, and her testimony is in the record, and I stated to the Court that I [466] would connect it up and show who took the picture, and I submit that it is now properly admissible.

Mr. Clausen: If the Court please, the witness just now stated that certain items were there and not shown in the picture and therefore the statement of counsel can't be correct.

Mr. Angell: Well, your Honor, a picture is a

(Testimony of Paul L. Kirk.)

picture of whatever the camera picked up. What he says is in that picture, the camera did not pick up some bedboards that protruded into the passageway back of where the picture shows. A picture never shows anything except what is in it, and that is all we are offering it for, what is in it.

The Court: Matter submitted?

Mr. Clausen: Yes, your Honor.

The Court: The objection is overruled.

Mr. Clerk: Plaintiff's Exhibit admitted and filed in evidence.

(Photograph previously marked for identification received in evidence and marked Plaintiff's Exhibit 7.)

Mr. Angell: Q. Now, Dr. Kirk, did you make an examination of the body at the morgue, as you said, or at the Chapel of the Chimes?

A. Yes, I examined the body on March 17th.

Q. Will you just state to the Court briefly the nature of that examination, the purpose?

A. The examination consisted primarily in observing the [467] entrance and exit wounds of the bullet. The front, the entrance wound in the chest, the position of it was noted and its condition noted.

Also, the exit wound, in the back, was examined to determine primarily the course of the bullet through the body, rather than for any other purpose.

Q. Did you ever see some pictures, photographs of the body, taken by the police—the Berkeley police—and pictures of the gun?

A. I recall seeing pictures taken in the base-

(Testimony of Paul L. Kirk.)

ment by the Berkeley police when they first visited the premises, I believe. I don't recall the details of them. I would recognize them if I saw them, I believe.

Q. I will show you Defendant's Exhibit F for identification and ask you if those are the photographs you saw or some similar to them.

A. Yes, these are either the photographs I saw or photographs of the scene, scenes in the same manner.

Q. Now, Dr. Kirk——.

Mr. Clausen, are you going to offer these photographs in evidence?

Mr. Clausen: I haven't seen them, counsel.

Mr. Angell: Oh, you put them in.

Mr. Clausen: Are these the ones that the police produced? [468]

Mr. Angell: They were attached to your Exhibit F that were produced by the police.

Mr. Clausen: The ones produced were these—was this envelope.

The Court: The officer had those.

Mr. Clausen: That is part of the police file?

Mr. Angell: That's correct.

Mr. Clausen: I have no objection to these going in, no.

The Court: Let them be admitted and marked.

Mr. Angell: Do you wish them to go in as our exhibit or as yours? You offered them for identification.

Mr. Clausen: Put them in as mine, certainly.

(Testimony of Paul L. Kirk.)

Mr. Angell: If you offer them, I will offer no objection.

Mr. Clausen: Fine.

The Court: They will be admitted and marked next in order.

The Clerk: Defendant's Exhibit J, admitted and filed in evidence.

(Group of photographs received in evidence and marked Defendant's Exhibit J.)

Mr. Angell: Q. Now, Dr. Kirk, did you ascertain how Mr. Houston was dressed at the time he was shot?

A. I made inquiries with regard to it, yes. I have only second-hand information, of course. Mrs. Houston informed me as to what he was wearing.

Q. What did she tell you he was wearing?

Mr. Clausen: Your Honor, that would be hearsay. I mean, there is no point——

The Court: The objection will be sustained.

Mr. Angell: Q. You examined Mr. Houston's body at the morgue. Was there any clothing on Mr. Houston?

A. Yes, he had a suit on at the time.

Q. Did you examine the gun with which Mr. Houston was shot? A. I did.

Q. And where did you obtain that gun?

A. I obtained it from Inspector Parker at the Berkeley Police Station on March the 15th, 1954.

Q. And I will show you Defendant's Exhibit B and ask you if you can identify that as the gun.

A. Yes, it is the same gun which I examined.

(Testimony of Paul L. Kirk.)

Q. Did you examine the floor where the gun was discharged? A. I did.

Q. And did you remove that portion of the flooring where the gun was discharged? A. I did.

Q. And did that piece of the floor—do you have any marks or evidence of a gun having been discharged there?

A. It had a single indentation, yes.

Q. Have you that piece of flooring here?

A. I do. [470]

Q. Well, you personally sawed this (indicating piece of wood) out of the basement where the—in the corner where on Plaintiff's Exhibit 1 is shown a hole cut in the floor? .

A. Yes, I personally sawed it out on March the 24th.

Mr. Angell: I will offer this into evidence.

Mr. Clausen: May I see it, please?

Mr. Angell: Offered in evidence as Plaintiff's next in order.

Mr. Clausen: I think we should remove the covering.

Mr. Angell: I was going to let the witness do that.

Mr. Clausen: We should remove the covering before it is offered, your Honor. And I would like to see it. The exhibit is covered and I will ask counsel to remove the cover.

Mr. Angell: Q. Did you put this covering on it? Let the record show this is a cellophane covering. Did you put that on, Dr. Kirk?

(Testimony of Paul L. Kirk.)

A. Yes, I put the cover on merely to preserve it, to preserve the board in the meantime, as a matter of precaution.

Q. Incidentally, was there anyone with you at the time you went out to make the inspection?

A. On one occasion there was, yes. Not on every occasion.

Q. Who was with you?

A. At the time I sawed out the board I was alone. On March 19th I was in company with Mr. Lowell W. Bradford.

Q. Who is Mr. Bradford? [471]

A. Mr. Bradford is the laboratory criminalist for the County of Santa Clara at the present time. He was formerly an associate of mine at the University as well.

Mr. Clausen: May I ask the witness a question on voir dire concerning this?

The Court: You may.

Mr. Clausen: Dr. Kirk, counsel has referred to this board and you have stated that you sawed it off. Now, was this a part of the board that was found directly under the hole in the ceiling?

A. It was found below the hole in the ceiling, not exactly direct; it was on a slight angle.

Q. How slight? A. I beg your pardon?

Q. I say, how slight an angle was it?

A. About six degrees.

Q. Six degrees—it was below the hole in the ceiling? A. That's correct, yes.

(Testimony of Paul L. Kirk.)

Q. Which part of this board was the floorboard that the people walked on, Dr. Kirk?

A. Well, all this was floorboard.

Q. I understand. A. I sawed it out.

Q. There are two sides, this side and that side.

A. This is the top. [472]

Q. In other words, this is the top?

A. That's correct. There are three indentations in there, I believe, two of which I placed there and one is the original. The original is the one in the center. I placed this one and this one.

Q. That's exactly what I was going to ask you, Dr. Kirk. I see on there there are two which span an inner slit. Now, did you measure this inner indentation? A. Yes.

Q. How deep is that?

A. About—it's a 33rd of an inch.

Mr. Angell: I submit, I brought this witness here. I would like to examine him to show what is on that board.

The Court: Give counsel an opportunity. You can cross examine.

Mr. Clausen: I wanted to find out, your Honor, to see if the witness did not——

Mr. Angell: If you will give me time, I will identify this thing and everything on it.

Mr. Clausen: Pardon.

Mr. Angell: I can't do it in one question.

Mr. Clausen: I am addressing my remarks to the Court.

If the Court please, what I am trying to find out

(Testimony of Paul L. Kirk.)

is that if the witness knew or saw this on the day that we are concerned with. [473]

The Court: Very well. Ask him the question.

Mr. Clausen: Yes.

Q. Do you understand, Dr. Kirk, my question? I would like to know if you know if this board was in this condition on the 22nd of February or whether you just found it this way when you went there.

A. Well, naturally I only saw it that way when I went there.

Mr. Clausen: All right.

A. On March the 14th.

Mr. Angell: Q. Now, you have handed me this board and I will ask you again, to be sure it is in the record, what date you cut that off of the floor.

A. I cut that out on March the 24th, 1954.

Q. The board has three marks on one side of the surface, is that correct?

A. That is correct.

Q. And were all those marks on that surface when you first saw the board?

A. No. At the time I first saw the board, only the one at the center was present and that was true until after the board was cut out. The other two were put there——

Q. Have you any kind of ink or anything where you can mark a circle around the first of those holes, and mark that K-1 on that board?

A. This is the original indentation (indicating).

Q. The original indentation.

(Testimony of Paul L. Kirk.)

A. (Witness indicating.) (Designating K-1.)

Q. Now, as to the second, pick either one of the other two indentations and call it the second—will you state when that was put in there, if you know?

A. This was made on the following day, March the 25th.

Q. And by whom? A. By me.

Q. And was anyone present when you made it?

A. Yes, my assistant was with me that day, though I made the indentations.

Q. Mark that K-2.

A. (Witness designating K-2.)

Q. Now, the third indentation, do you know who put that there? A. Yes, I did myself.

Q. Will you call that K-3?

A. (Witness designating K-2.)

Mr. Angell: I don't believe I offered this board, so I will now offer it for identification so that we will speak of it by number.

The Court: It may be admitted and marked next in order for identification.

The Clerk: Plaintiff's Exhibit 12 marked for identification. [475]

(Piece of flooring marked for identification Plaintiff's Exhibit 12.)

Mr. Angell: Q. Now, Dr. Kirk, referring to Plaintiff's Exhibit 12 for identification, will you state what K-1 is as shown on Plaintiff's Exhibit 12 for identification? Will you identify that mark?

A. K-1 is an indentation noted in the floor below the point at which there was a hole in the ceiling,

(Testimony of Paul L. Kirk.)

apparently a bullet hole, first noted on the first visit which I made to the Houston home, on March 14th, and studied more in detail later, on the 19th particularly.

Q. And will you state what K-2, that indentation is, if you know?

A. K-2 is an indentation which I placed in the same board, with the same rifle, by placing the board on the ground, holding the rifle in the same position as it must have been held in the basement, and firing it. It represents the recoil indentation of the stock in the board.

Q. And No. 3?

A. No. 3 was the duplicate of the same experiment. There were two rounds fired, in order to place recoil markings in the board.

Q. Was the board in on the floor in the basement or did you remove it, take it out where you could fire the gun?

A. I had to take it out where it could be fired. It was [476] actually on the ground along the roadside.

Q. And you then placed the stock of the gun on the board and discharged the bullet, is that correct?

A. That's correct.

Q. In each of those places?

A. That's correct.

Q. The indentations placed there were the results of those firings, is that correct?

A. That's correct, yes.

Q. Now, did you make an examination to deter-

(Testimony of Paul L. Kirk.)

mine where the spent bullet was, while you were there?

A. Yes. The bullet had entered the back of a chair in the living room and it was lodged under the upholstery toward the top of the back of the chair.

Q. And was that chair directly above the hole?

A. It was.

Q. The hole in the ceiling, for the record.

And did you remove that bullet?

A. No. Some effort was made to get it out, but it would have required removing the upholstery from the chair and eventually we left the bullet in place.

Q. Now, did you make any measurements to ascertain the direction of the bullet through the ceiling?

A. Yes. Measurements were made. A cleaning rod was inserted in the hole through the ceiling and a cord was placed [477] so as to be an extension of the cleaning rod so that the exact path of the bullet through the basement could be charted, with the exceptions only of any minor deflections which might have occurred in the passage through the body.

Q. And what deflection or angle did that go through the floor?

A. The bullet was inclined about six degrees to the north and about six and a half degrees, I believe, to the east.

Q. Now, did you ascertain by any means whether

(Testimony of Paul L. Kirk.)

the gun plus stock of the gun placed on the floor in the first of the impressions, the one that is marked K-1, whether a shell fired with a gun on that position would have gone through that hole in the ceiling?

A. Yes, the barrel of the gun was aligned with the cord which was an extension of the hole through the ceiling, and it was found that the heel of the butt came quite closely to the indentation in the floor in that position.

Q. Did you make casts of that impression that was there as shown on that Exhibit 12 for identification? A. Yes.

Q. Will you show that impression?

A. (Witness producing plaster cast.) I make a plaster cast of it. I took it in with wax at the time or with clay and reproduced in plaster.

Q. Will you produce that? [478]

A. (Handing counsel.)

Mr. Angell: The witness hands me a plaster cast.

Q. And you state that this is a plaster cast of the indentation made by the gun?

A. It is a positive replica. I mean, it was made from a negative clay impression.

Mr. Angell: I will offer this in evidence.

Mr. Clausen: May I see it?

Mr. Angell: Yes. Pardon me. (Handing counsel.)

Mr. Clausen: May I ask a question concerning this, your Honor?

The Court: You may.

Mr. Clausen: Do I understand, Dr. Kirk, that

(Testimony of Paul L. Kirk.)

this is an impression of the indentation which was in the center of that floorboard and which you marked K-1?

A. That is correct, yes, sir.

Mr. Clausen: And which was aligned underneath the hole in the ceiling, is that correct?

A. That is correct, yes, sir.

Mr. Clausen: And which in your opinion shows the recoil of the rifle?

A. That is correct, yes, sir.

Mr. Clausen: All right.

Mr. Angell: I will now offer this——. Well, first, your Honor, in the interest of order, I will offer the board [479] there, which was 12 for identification, I will offer that in evidence in connection with the witness's testimony.

The Court: It will be admitted and marked.

The Clerk: Plaintiff's Exhibit 12 admitted and filed in evidence.

(Piece of flooring received in evidence and marked Plaintiff's Exhibit 12.)

Mr. Angell: I will offer the plaster cast which the witness has testified is a replica of the impression of the board shown as K-1 on Plaintiff's Exhibit 12; offer it as Plaintiff's Exhibit 13.

Mr. Clausen: Have you offered the board, Mr. Angell?

Mr. Angell: Yes, it is Plaintiff's 12.

Mr. Clausen: The plaster cast is 13?

Mr. Angell: 13.

(Testimony of Paul L. Kirk.)

The Court: It will be received and marked next in order.

The Clerk: Plaintiff's Exhibit 13 in evidence.

(Plaster cast of impression K-1 received in evidence and marked Plaintiff's Exhibit 13.)

Mr. Angell: Q. Dr. Kirk, did you determine in your investigation the direction of the bullet, the path of the bullet through Mr. Houston's body?

A. Yes, as nearly as could be told. It is a little bit difficult, of course, with the body in a casket, but the body was raised and the entrance and exit wounds were measured up [480] as well as was possible with the source available.

Q. Will you state for the record what those measurements disclosed?

A. The bullet entered between the midline of the chest and the nipple. I have the measurements here (referring to notes). The entrance wound about three-quarters of an inch, about, above the nipple line, the line connecting the nipples, and about two and a half inches left of the center. That is from the sternum to the left.

The exit wound was somewhat lower, about two inches, as well as could be told, on the other side of the body. It could only be estimated—a little bit inaccurately—and its exit was four inches left of the center line—that is, of the spinal column.

The bullet actually coursed somewhat downward as it went through the body and to the left side.

Q. Do you know how tall a man Mr. Houston was?

(Testimony of Paul L. Kirk.)

A. Yes, he was quite a tall man. I don't remember measuring his exact length, but he was certainly over six feet.

Q. Does your record show the height of the area where the bullet was removed, which is Plaintiff's Exhibit 12 in evidence?

A. It is five feet ten and a half inches above the platform to the ceiling.

Q. Now, did you examine the gun—that's Defendant's Exhibit B—to determine under what conditions that gun could [481] be fired or discharged?

A. Yes, I examined it in connection with Mr. Bradford. The two of us worked together on it at the time. We tested various possible ways of firing it, and examined the loading mechanism, and so forth.

Q. Now will you state in your own words the result of your examination, as to the different methods by which that gun could be fired?

Mr. Clausen: Well, your Honor, we will object to that on the ground it would be evidence of test by a ballistics expert which anybody could perform. There is no showing here that these various tests involve the way the gun was discharged at the time of the shooting, except that the trigger would be pulled, and I have in mind, your Honor, that it would be pure rank speculation, for example, to try to conjecture or speculate on how a gun might be accidentally discharged, when there is no proof of any such accident. I have in mind, your Honor, that the clear facts here show exactly now that the wit-

(Testimony of Paul L. Kirk.)

ness is now testifying that the party, in view of the hole in the ceiling above, in view of the indentation of the gun on the floor, the victim must have been standing over in that way and the only possible method it could have been fired would have been by pulling the trigger, and your Honor will have in mind——

Mr. Angell: I object to that as a statement——

Mr. Clausen: Pardon me, counsel——

Mr. Angell: It is not supported by the evidence.

Mr. Clausen: Pardon me, counsel——

Mr. Angell: It is conjecture, it is an argument, it is not the proper objection.

Mr. Clausen: Your Honor, may I proceed?

Mr. Angell: And——

Mr. Clausen: Or shall I desist?

The Court: Give him a record on it, counsel. Proceed.

Mr. Clausen: And I have in mind a case, your Honor, in 43 California 2nd, in which there the court excluded ballistic expert testimony on somewhat similar grounds, in other words, calling in a ballistics expert to figure out how other methods could be used to discharge a firearm, when, as a matter of fact, the facts showed that it was suicide. 43 California 2nd, your Honor, the case is Long against some insurance company.

Mr. Angell: The case is obviously not in point. There is no evidence before this court that there was any suicide in this case.

The Court: (To Clerk:) Will you go get that case?

(Testimony of Paul L. Kirk.)

Mr. Angell: The question I am asking the witness is how this gun could be discharged.

The Court: You tell me what that spells out, your interpretation of it. [483]

Mr. Clausen: This is what it says in the syllabus:

“In an action seeking recovery on life policies on ground that death by shooting was result of accident, when insured tripped and fell as he ran out of the house with gun in his hand, it was not error to exclude testimony of plaintiffs’ ballistics expert as to tripping and fall tests—tests made by him to determine how he could produce wounds such as those inflicted on insured, especially where ballistic expert called by plaintiff had already testified that person holding pistol might fall so that it would strike the ground butt first and remain pointed toward him, such tests not being proper subject of expert testimony.”

In other words, in this case, your Honor, the insured ran out of the house, went out of the house with a pistol in his hand. What they were trying to do is have a ballistic expert show that it was accidental, when all the facts showed it was suicide. And in this particular case the court excluded then the expert ballistics testimony, and the Supreme Court of California here, decision of last year, held it was not error.

Mr. Angell: Now, if your Honor please, we are not trying to show here by this witness any test. What we are asking this witness is his opinion from the experimentations that he made, the differ-

(Testimony of Paul L. Kirk.)

ent manners in which this gun could be [484] discharged. That's the only question we are asking him.

The Court: Could be discharged?

Mr. Angell: Yes.

The Court: Now reframe your question so I may rule on it.

Mr. Angell: Q. Did you make any examination, Dr. Kirk, to determine the different methods by which this gun could be discharged?

A. Yes, I did.

Q. Will you state what your investigation examination showed?

Mr. Clausen: Your Honor, I object to it on the grounds just urged, in other words, all my objections just urged, that it would be conjecture, all the other grounds I just urged.

The Court: I will sustain the objection at this time.

Mr. Angell: Q. Dr. Kirk, did you discharge this gun by dropping it?

Mr. Clausen: Same objection, your Honor. Same objection, in other words, on all the grounds I just urged.

The Court: I will allow it subject to a motion to strike.

Mr. Clausen: May I make that motion to strike at any time before the end of the trial, your Honor?

The Court: Yes. [485]

Mr. Angell: Q. Will you answer the question?

A. I witnessed the discharge of this weapon by striking it when the hammer was down on the firing

(Testimony of Paul L. Kirk.)

pin. Mr. Bradford actually had the gun in his hand.

Q. And you dropped the gun and it discharged, is that correct?

Mr. Clausen: May I, so I won't be interrupting on this line of testimony, your Honor, may it be understood that my objection runs to this entire line as I have just embraced in my argument on this Long case?

The Court: The record will so show.

Mr. Angell: Q. Go right ahead and state what you saw.

A. Yes. The gun was discharged once by striking it on the butt on the floor when the hammer was on the firing pin. I believe that is the circumstance.

Q. Did that make an indentation on Plaintiff's Exhibit 12 in evidence.

A. No, no, that was not on Exhibit 12.

Q. Now, did you make the indentations on Plaintiff's Exhibit 12 by discharging the firearm?

A. Yes. The indentations were made by discharging the fully charged firearm directly by pressing the trigger of the cocked gun.

Mr. Clausen: What page, Mr. Reporter?

The Reporter: This is note 1 of today's proceedings. [486]

Mr. Angell: Q. That was with the butt of the gun placed on the ground, on the floor?

A. In making the discharges on the board, the board was placed on the ground.

The Court: Identify the board.

Mr. Angell: Beg your pardon?

(Testimony of Paul L. Kirk.)

The Court: Identify the board.

Mr. Angell: Q. That is the board here in evidence as Plaintiff's Exhibit 12, is that correct?

A. Yes, that's correct, Plaintiff's Exhibit 12.

Q. By placing the board on the ground, the gun on the board, and loading the gun and firing it, it made these indentations on Exhibit 12, K-2 and K-3, is that correct?

A. That's correct, yes.

Q. Now, did you discharge that gun by raising it up and dropping it?

A. Not at that time.

Q. Did you at another time?

A. At another time. It was discharged, as I stated, by Mr. Bradford in my presence with an unload cartridge, which was merely fired, the cap, so that it could be done indoors.

Q. What was done on that occasion?

A. The powder was removed from the cartridge. The cartridge was inserted. The hammer was placed on the firing pin. And the gun was struck to the floor butt downward. [487] There was one discharge, as I recall—not in my notes—one discharge produced that way.

Q. Now, as a result of your investigations with this gun, what in your opinion would be the different ways in which that gun could be discharged?

A. Well, certainly it could be fired in the normal manner, it could be cocked and the trigger could be pulled.

(Testimony of Paul L. Kirk.)

It could be fired if the hammer is on the firing pin, it could be fired by striking the butt.

It could perhaps, though I did not see this reproduced nor did I reproduce it, be fired by a snapping action between the half-cocked position and the fully down position; that is, there was always an indentation placed in the primer of this gun under those circumstances, but it was normally not deep enough to fire. It could happen, however.

The most probable ways, of course, are methods which would involve the cocking of a loaded gun and some mechanism whereby the trigger is pulled. That is, either by the finger intentionally or by other methods.

Q. Did you observe the way this mechanism of this gun worked (indicating Defendant's Exhibit B)?

A. Yes. I noted that the lever action on that gun is quite loose and it comes open very, very readily, so that it—that is something which very possibly could occur under any circumstances—the lever could come open and would then, if [488] it were closed, could load and cock the gun without even perhaps being known by the person doing it.

Q. And could a person, of Mr. Houston's height, bent over in a bending position to close that lever, could his—in that position—could his fingers touch the trigger?

A. Yes, they could. He could reach the trigger very nicely in the position in which he was.

Q. Now, as I understand it, and for the record,

(Testimony of Paul L. Kirk.)

we have the gun, the mechanism, the lever mechanism, which you say was loose and could have been open, was the mechanism or the part of the gun that covered the trigger, is that correct?

A. That is correct.

Q. And form the protective housing for the trigger?

A. It covers the trigger. It also is operative in loading the gun on the repeating action.

Q. So that a person removing that gun from the corner and turning around and stepping down, leaning over, as I understand, to close that, could have the hand come in contact with the trigger physically.

Mr. Clausen: Well, your Honor, we object to that as leading and suggestive, and also even going beyond speculative realms.

Mr. Angell: It calls for a measurement and that's all.

Q. Physically, he—his hand, would reach it, is that correct? [489]

A. That is correct, yes.

Q. Or he could intentionally have reached over and discharged it, is that correct?

A. That is true, yes.

Q. It could have been either way?

A. It could have been either way.

Q. In your opinion, Dr. Kirk, assuming a man six feet one and a half or two inches tall, and in that location where the hole was cut and where the gun was discharged, and assuming that he was bent over, as he would be required to be because of the

(Testimony of Paul L. Kirk.)

height of that ceiling, which was less than his height, and assuming that he had reached into the corner to get that gun and had turned around and reached over to close that mechanism, in your opinion could that mechanism have been—the gun have been discharged?

Mr. Clausen: Your Honor, we object to that as having been asked and answered, and again it is far beyond the realm of any evidence in this case. In other words, the only evidence in this case shows an intentional shooting of the trigger—pulling of the trigger.

Mr. Angell: There is no such evidence.

The Court: The objection will be overruled. I will allow it.

A. Yes, it is my opinion that could very definitely have happened. [490]

Mr. Angell: Q. And you testified it is your opinion also it could also be discharged by dropping it down?

A. It could have been discharged by dropping also.

Mr. Angell: Take the witness.

The Court: We will take the recess.

(Short recess taken.)

Mr. Angell: One more question before cross that I neglected to ask Dr. Kirk.

Q. Dr. Kirk, did you examine Mr. Houston's body with respect to powder burns?

A. Yes, I did.

Q. And did you find powder burns there or not?

(Testimony of Paul L. Kirk.)

A. Yes; there was a black area about one inch across around the bullet hole, with some powder scattered in a wider circle.

Q. From that can you determine from your knowledge of bullets fired against bodies the distance the gun was from the body at the time of firing?

A. The gun was—the muzzle of the gun was within one inch, but it was not in exact contact.

Cross Examination

Mr. Clausen: Q. Dr. Kirk, as I understand your testimony, when you arrived out there you made certain chest diagrams—not diagrams, but certain tests to determine the alignment of the gun with the bullet hole in the ceiling; is [491] that right? A. That is correct, yes, sir.

Q. And the way you figured it out, why, you brought down, I believe you said, a thread or a string was that, from the bullet hole in the ceiling?

A. Yes.

Q. Down to the place on the floor where this indentation was made which you say was made from recoil of the rifle; is that correct?

A. That's essentially correct, yes.

Q. And that came down to a point then that you have marked on this floorboard as K-1; is that right?

A. K-1 was not an exact extension of the string because of the offset in the butt of the rifle, of course. That is fairly close.

(Testimony of Paul L. Kirk.)

Q. An approximation?

A. Yes; it was an agreement with the position.

Q. And, as I understand your testimony, then, the gun would have rested on the floor of this approximate point of K-1 and have been directed to the heart area of Mr. Houston as he would be bending over by reason of his height, six feet something, two inches or so, with that gun pointing right at his heart area and the muzzle was at least right close to his body within an inch; isn't that correct?

A. Yes, that is correct. [492]

Q. And it is entirely possible for Mr. Houston to have intentionally pulled the trigger?

A. It is possible, yes.

Q. Yes. At the time that you made this examination and at the time you did this aligning, this indentation K-1—I am not speaking of some slight variance of five or six degrees, but, in any event, that was almost vertical to this hole in the ceiling; is that right?

A. It was in line with the bullet flight, yes.

Q. And almost vertical?

A. Just a little off vertical.

Q. Just slightly off vertical; isn't that correct?

A. That's correct.

Q. Isn't it also correct, that it being slightly off vertical and having in mind the height of Mr. Houston, that not only was he bending over—not only was he bending over parallel to the floor in this fashion with this directed up there against his heart, but by reason of his height and by reason of

(Testimony of Paul L. Kirk.)

the fact that his arm to come down to the trigger area—for his arm to come down to that area, his body would have to be bent over more than parallel; in other words, down in this fashion as I am bending now (demonstrating)?

A. Yes, his body would have been horizontal or a little bit more, yes.

Q. Well, it would have had to be more from the fact that [493] you had this string almost vertical and the fact that the bullet came out lower in the back than it went in in the front; isn't that correct?

A. Yes, that is correct; he had to be a little bit more than horizontal.

Q. Yes. Now, these indentations—I am speaking of all three, Dr. Kirk, that are on this Exhibit which has been marked Plaintiff's Exhibit 12—all these three indentations were made by the gun resting on the floorboard and the trigger pulled; isn't that right?

A. Well, the two that I made were, but I gave no testimony that the other one was.

Q. I see. In other words, none of these so far as you know were ever made by any gun falling or striking against the floor?

A. Not to the best of my knowledge, no.

Q. And so far as you are concerned the tests that you made—well, let me ask it in this way: So far as you are concerned the—what was that you stretched? Was that a string?

A. A string or a cord, yes.

(Testimony of Paul L. Kirk.)

Q. And who was present when you did that, Dr. Kirk?

A. The last time it was done, the time it was done more correctly, I did it in company with Mr. Bradford.

Q. Let me ask you this now: When that string came down from the ceiling, down to this place that has been marked K-1, [494] as you described, in your reconstruction of the shooting, if this was on the floor and if the gun was resting as you say it rested on this K-1 here from the shoulder pad, and if Mr. Houston was leaning over as you reconstruct it like this so that his arm would touch the trigger, would that string have passed through the bullet hole that you saw in the body where you reconstruct it in the body of Mr. Houston?

A. Yes, it would have passed essentially through the bullet hole.

Q. Exactly. This explains, then, where the gun was then resting as you brought down the string; it was in the center of the passageway, was it not?

A. Very close to the center of the passageway, yes.

Q. Now, you testified and I objected to the testimony concerning tests that you made. Isn't it true that despite the fact that you tried to fire that gun when it was loaded and when it was cocked by dropping it, you could not do it?

A. No, it was done once.

Q. I beg your pardon?

(Testimony of Paul L. Kirk.)

A. It discharged once by dropping it, by striking it on the floor.

Q. When it was cocked and loaded?

A. No, when the hammer——

Q. I asked you this——

A. Oh, cocked and loaded? I beg your pardon.

Q. Yes.

A. It did not discharge when it was cocked and loaded.

Q. And the only time that you could do it the other way, even though you tried, was to have it discharge once; is that right?

A. That is correct; that's all it was actually done.

Q. Yes. Then to get back to the questions I asked you first, Dr. Kirk: No matter how many times you tried to discharge that gun when it was loaded and when it was cocked by dropping it, jarring it, giving it a slap on the butt, on the side or in any other direction, you never could discharge it?

A. That is correct; it did not discharge when it was cocked.

Q. As a matter of fact, the gun itself has a reasonably strong trigger pull, hasn't it?

A. About five pounds, yes.

Q. So that answer to my question is "Yes"; isn't that correct?

A. Yes, that is correct. That is about a normal trigger pull for that kind of a rifle.

Mr. Clausen: I think that is all, your Honor.

(Testimony of Paul L. Kirk.)

Redirect Examination

Mr. Angell: Just one question, your Honor.

Q. So that the record will be perfectly clear on it, as [496] I understand it, you discharged the gun once by dropping it?

Mr. Clausen: Object to that as having been asked and answered, your Honor.

Mr. Angell: I know, but the record I don't think is clear.

The Court: I will give him a record on it. Objection overruled.

Mr. Angell: Q. You dropped it once when the gun was loaded and the trigger was not cocked; is that correct?

A. When the hammer was not cocked.

Q. That is correct; the hammer was not cocked.

A. It was against the firing pin.

Q. It was against the firing pin; the gun was loaded? A. That is correct.

Q. And the gun was dropped and it discharged once for you? A. That's right.

Mr. Angell: That is all.

Mr. Clausen: That is all, your Honor.

Mr. Angell: Call Mr. Bradford.

(Witness excused.)

LOWELL W. BRADFORD

called as a witness on behalf of the plaintiff; sworn.

The Court: Your full name?

A. Lowell W. Bradford.

The Court: Where do you reside? [497]

(Testimony of Lowell W. Bradford.)

A. At 21 North Carlyn in the City of Campbell.

The Court: And your business or occupation?

A. Criminologist.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. How long have you been engaged in the profession as a criminologist?

A. Since June of 1947.

Q. And in connection with your work have you been a witness as an expert on ballistics and guns, firearms?

A. Not ballistics but in connection with firearms for identification and investigation.

Q. What is your present occupation?

A. I am presently employed by the County of Santa Clara as the director of the laboratory of criminalistics.

Q. What does that job consist of?

A. That job consists of operating the laboratory, which is the official physical evidence laboratory for all of the police agencies in the County of Santa Clara.

Q. Does that work entail the examination of firearms and their discharge? A. It does, yes.

Q. And what experience did you have before you came to that job in the handling of firearms and experience with firearms and testing firearms?

A. Prior to that job in Santa Clara County?

Q. Yes.

A. Prior to that time I was employed by the

(Testimony of Lowell W. Bradford.)

California State Department of Justice in Sacramento as state criminologist in their technical laboratory.

Q. And in that connection did you examine guns and the discharge of guns?

A. I did, yes.

Q. And are you a graduate of any technical institution? A. I am.

Q. What?

A. The University of California at Berkeley.

Q. Have you taken any postgraduate work of any kind in it?

A. Yes; I took a year as a graduate student.

Q. And were you in the service?

A. I was.

Q. In the service did you have anything to do with firearms and ballistics? A. I did, yes.

Q. You were requested by me, on behalf of Mrs. Houston, were you not, to go over to the Houston home on Miller Avenue in Berkeley sometime last year? A. I was, yes.

Q. And what time was that?

A. On one occasion, on March 17th, at Dr. [499] Kirk's office and one occasion, on the 19th of March, at the home.

Q. And did you go up into the basement where this shot was fired? A. Yes.

Q. Which killed Mr. Houston. And did you make an examination of the condition of the basement at the time you went up? A. I did.

Q. Will you describe in your own words the

(Testimony of Lowell W. Bradford.)

condition of the area immediately adjoining the place where the bullet was discharged from the gun?

A. As I recall it, I went downstairs into the basement where there was a basement which had substantially two sections to it—one, an area in which I could stand up, being the part immediately adjacent to the entrance stairway, and then an area in the back end of the basement which had a raised platform on it and in which I could not stand erect and in which there was stored quite a few miscellaneous household items of furniture and other objects—very crowded.

Q. Now calling your attention to Plaintiff's Exhibit 1—will you step down here to the board, Mr. Bradford—and directing your attention to the mark on there C-2, I will ask you if your recollection is that that is about the location of any physical evidence there to show where the gun had been discharged. [500]

A. I would say that is about the location, yes.

Q. And do you recall the clearance space in there in the passageway, if any?

A. I didn't measure it, but, as I recall it, it was sufficiently close so that I had be very careful not to rub against anything in there; it was very crowded.

Q. And were there any protruding or projecting obstacles sticking out into that passageway from the sides? A. Yes, as I recall—

Mr. Clausen: Your Honor, I don't recall if I

(Testimony of Lowell W. Bradford.)

objected before, but I would certainly object on the ground that the witness obviously is there days after the event to which we are directing our attention.

The Court: That goes to the weight of the testimony, does it?

Mr. Clausen: That's right, your Honor.

A. As I recall, there were many objects protruding in the hallway—pieces of furniture principally.

Mr. Angell: Q. Did you notice a depression in the floor there, Mr. Bradford? A. I did, yes.

Q. And did you have the gun with you at that time to determine whether or not that depression fitted the butt of the gun?

A. We did have the gun at that time, yes. [501]

Q. Where had you gotten that gun?

A. I obtained that gun, I—I believe it was in Dr. Kirk's possession at the time.

Q. And would you recognize the gun if I showed it to you? A. I think I would, yes.

Q. I will hand you Defendant's Exhibit B and ask you if that is the gun.

A. Yes, that looks like the gun.

Q. Did you take down the numbers of the gun?

A. I believe I did. I don't seem to have it with me here at the present time.

The Court: Stipulated this is the gun, only to identify it for the purposes of the record?

Mr. Angell: Yes.

Mr. Clausen: Yes, your Honor.

(Testimony of Lowell W. Bradford.)

Mr. Angell: All right. I just wanted to clear up that there is no question but that is it.

Q. Did you make any tests at all in connection with Mr. Kirk or by yourself to determine the manner in which that gun could be discharged, how the gun could be fired?

Mr. Clausen: I just assume, your Honor, when my objection I said runs through the line, it includes any such testimony?

The Court: Let the record so show.

A. Yes, we made tests together. [502]

Mr. Angell: Q. And those tests were to determine how that gun could be fired?

A. Well, that was one of the purposes, yes.

Q. Did you also make any measurements to determine the course of the bullet up through the ceiling and upstairs? A. Yes.

Q. And what did you find the course of the bullet was?

A. Well, describing it briefly, the gun was placed in the area of the dent. The dent in the floor was used to locate the butt of the rifle. The hole in the ceiling of the basement was used as the other reference point, and a line was then constructed between the end of the gun, the muzzle end of the gun placed with its butt in the dent in the floor; a line was direct with a cord from the end of the muzzle to the hole in the ceiling. I then acted as model and placed my body over the gun, and of course the string was used at that time, placed at one side, to observe the alignment, and we observed

(Testimony of Lowell W. Bradford.)

that the alignment of the gun left the body in that position and with the hole was a consistent alignment, indicating that the bullet had passed through the body as it bent over the muzzle of the gun in that position.

Q. And did you measure the deflection of the bullet from straight up, or perpendicular, what deflection it was as it went through the ceiling?

A. I made no angular measurement, no. [503]

Q. You made no angular measurement. Did you make some tests to determine in what manner that gun could be discharged?

A. I made various tests, yes.

Q. And will you state what the results of your tests were?

A. The first test that I made was a test on the trigger pull, using a trigger pull gauge. I found that the gun did not always discharge at the same trigger pull, and the range of variation was from four and a half to five pounds. It would always fire with five pounds pull; sometimes it required as little as four and a half pounds. The second test was to determine the effectiveness of the safety mechanism, if any. And there is only one safety mechanism on this gun, which is known as the half-cocked position. Shall I demonstrate that?

Q. Yes. Do you want the gun?

A. Yes, please. The firing pin has three possible positions. One is when it is fully retracted in the firing position; the second when it is let down carefully in what is known as the half-cocked position.

(Testimony of Lowell W. Bradford.)

In that position the firing pin does not lie on the—the hammer does not lie on the firing pin; there is a space between. The third position is the position following firing when the hammer is directly on the pin. And that position can also be reached by quickly letting down the hammer—as the trigger is pulled, letting down the hammer with the thumb past the half-cocked position. This half-cocked position is what I referred to as the safety [504] position. It appears to be in good order, that being the only safety mechanism.

The other tests that I made had to do with being able to dislodge the hammer from the cocked position by striking first on the left side with a hammer, then on the right side, then on the bottom, then on the top, and then by jarring the butt. And I found that the hammer in the fully cocked position would not dislodge from any one of those positions with a blow.

The next test was to place in the chamber of the barrel a round of ammunition from which had been removed the bullet and the powder, the detonating cap or primer still being in the cartridge case. The hammer was let down by using the combination of releasing the trigger with the thumb on the hammer, was let down past the half-cocked position, so that the hammer rested upon the firing pin. At that point the hammer spur was struck a light blow with a hammer and the round in the barrel discharged.

The next test that was made was to place a round of ammunition in the chamber, again with the bul-

(Testimony of Lowell W. Bradford.)

let and powder removed, with the primer cap still intact in the cartridge. The hammer was again let down past the half-cocked position to the firing pin, and the rifle was dropped on the floor butt first in this manner (illustrating). And upon one of those occasions the round discharged in the barrel.

I think that is the extent of the tests except that I [505] examined it generally for mechanical condition and I found that there was a tendency for the latch mechanism of the lever to open rather easily if any vibration or jar was applied to the gun, so that it was easy to place it in a position to open.

Q. So that if that gun were pulled out of position with anything and dropped, it would drop close to that position, is that correct?

A. There was a tendency toward that.

Q. And anyone moving over to close it would be leaning over the gun in a stooping position; is that correct?

A. It would be necessary to stoop to reach it, yes.

Q. Then, as I understand your testimony, Mr. Bradford, this gun could be discharged either accidentally or intentionally; is that correct?

A. Yes, that is correct.

Mr. Angell: That is all.

Cross Examination

Mr. Clausen: Q. May I ask you, Mr. Bradford, a question? I am referring, of course, to the time you went there—and I believe that was about the middle of March; is that correct?

(Testimony of Lowell W. Bradford.)

A. I stated it was March the 19th.

Q. All right. When you went there and you examined the basement down there you saw plenty of things stored, but you wouldn't say it was cluttered, by any means, would you? [506]

A. No, I would say it was as neatly done as possible for the amount of material in that space.

Q. And there was a passageway leading over to the point where you saw the indentation in the floor; is that correct?

A. There was a place by which one could walk, yes.

Q. Now, as I understand it, you took and you also examined X-rays of the bullet hole through the body; is that correct? A. That is correct.

Q. Now, you were here in the courtroom when I was asking Dr. Kirk some questions about the path of the bullet? A. Yes.

Q. Through the body. A. That is correct.

Q. Without going through the procedure, your answers I assume would be the same on that?

A. Yes, it would.

Q. Now, the tests that you made, the tests that you just indicated that you made with that gun to see about the gun being fired, actually you didn't and Dr. Kirk didn't use real bullets, did you?

A. By "bullets" I am not sure that we both mean the same thing.

Q. Well, all right. Bullets that would be the kind of a bullet that killed the deceased. You didn't use those, did you? [507]

(Testimony of Lowell W. Bradford.)

A. I am still not sure whether we have the nomenclature.

Q. Well, all right. I will ask you this: The kind of bullets you used you couldn't kill anybody with, could you?

A. We started out with the type that would kill people, but we removed the projectile part, which I referred to as the bullet, and we removed also the powder.

Q. Well, that isn't what I asked you, Mr. Bradford. I asked you the simple question: When you made the test with the gun that you have now demonstrated to the Court this morning, you didn't use bullets of the kind that killed Mr. Houston, did you?

A. We did not use any bullets.

Mr. Clausen: That is all.

Redirect Examination

Mr. Angell: Q. Where did you get the shells that you used in the gun for that purpose, Mr. Bradford?

A. They were two rounds of .30-.30 ammunition, which, as I recall, were removed from a paper bag in the basement of the Houston residence.

Q. And those were the caliber bullets that fitted this gun; is that correct?

A. That is correct.

Q. The gun being Defendant's Exhibit B. And what you did was to take these caliber bullets out of that paper bag—or take the shells out of the

(Testimony of Lowell W. Bradford.)

paper bag, and remove the bullet; [508] is that correct? A. That is correct.

Q. The lead of the bullet?

A. The projectiles were removed, yes.

Q. By the way, what kind of bullets did you notice in that paper bag, or shells?

A. The cartridges that I recall were that there were some 30-06 rounds. There were—I should say cartridges. There were some shotgun cartridges and there were also some .30-.30 cartridges. That's all I remember at the present time.

Q. And would you have any recollection of about how many bullets there were in there?

A. I can't recall except it was a bag approximately six inches in diameter and I would judge it had from four to six inches of depth with cartridges in it.

Q. Calling your attention to the powder burns on the body, when you examined the body did you see the powder burns?

A. I did not examine the body myself.

Q. You did not? A. No.

Q. Assuming that there were powder burns on the body, would that indicate anything to you? Let me withdraw that. Assuming that there were powder burns in the area of the wound where the bullet entered the chest, would that indicate to you, or from that could you determine how far away from [509] the body the gun was when it was discharged or whether it was on the body?

A. Our determination of the distance from the

(Testimony of Lowell W. Bradford.)

muzzle of the gun to the target can be made in some cases where there are powder burns, depending upon what one knows about the burns and their size.

Q. If a gun is right against the body, would there be any powder burns?

A. There usually is no burn at all; the only thing that is made in that case is a dark ring around the edge of the hole when the bullet enters.

Q. And if there are powder burns of a substantial amount, the gun muzzle would be in what position?

A. The muzzle would have to be removed from the skin sufficiently so that the gases which are emitted from the gun would then strike the outer skin.

Mr. Angell: I think that is all.

Mr. Clausen: No questions.

Mr. Angell: May Mr. Bradford be excused and Mr. Kirk?

Mr. Clausen: Yes, your Honor.

The Court: They may be excused.

Mr. Angell: Just a minute, Miss Hoffman. There is one gentleman here who is in a hurry to get away—Mr. Robinson.

WILLIAM G. ROBINSON

called as a witness on behalf of the Plaintiff;
sworn. [510]

The Court: Your full name, please?

A. William G. Robinson.

(Testimony of William G. Robinson.)

The Court: Your business or occupation?

A. I am a certified public accountant.

Direct Examination

Mr. Angell: Q. Where are your offices, Mr. Robinson?

A. 200 Bush Street, San Francisco.

Q. And did you have occasion to make up a statement showing the net worth or the assets and liabilities of Mr. Houston as of February 22, 1954?

A. Yes, I did.

Q. Just to hurry it along, did you prepare the inheritance tax affidavits and the community property affidavits and the federal estate tax returns?

A. Yes, that is correct.

Q. And you also prepared, did you not, a statement of financial condition of William M. and Charlotte S. Houston as of February 22, 1954?

A. Yes, I did.

Q. I will show you Plaintiff's Exhibit 8 for identification and ask you if that is the statement you prepared.

A. Yes. That appears to be the statement.

Q. Now, with the information contained in there—is that the information you had obtained for the purpose of filing the inheritance tax affidavit and the federal estate tax return? [511]

A. Yes.

Q. And the community property affidavit?

A. Yes.

(Testimony of William G. Robinson.)

Q. And you prepared those from the data which you had obtained; is that correct? A. Yes.

Q. And where did you obtain that data?

A. That data was obtained from records submitted to me by the law firm of Angell & Adams, who were the attorneys for the estate of Mr. William Houston.

Q. You show, do you not, in this return or statement the values put on real estate in the estate?

A. Yes, I do. Those were the valuations arrived at by the inheritance tax appraiser in the estate of William M. Houston.

Q. And all of those figures appearing in this statement were the figures submitted for the official purpose of the estate to determine the inheritance taxes, were they not?

A. With the exception — with the exceptions which are noted in the statement and its supporting schedule. In other words, for example, with regard to life insurance, it is presented at its estimated cash surrender value, which of course is not a figure that enters into the inheritance tax affidavit.

Q. As to determining that cash surrender value, where did [512] you get the cash surrender value for that figure?

A. Those are obtained from tables which are a part of the insurance policies.

Q. And you saw those policies?

A. I did not in every case see the policies, no. Some of the information I got by correspondence

(Testimony of William G. Robinson.)

with the Canadian—with an official of the Canadian Bank of Commerce, which had made loans secured by some of the policies, and to a certain extent I relied on their records, which had been obtained by reference to the policies themselves.

Q. The policies were located at the bank, were they not? A. Yes, they were.

Q. And in their possession, and the bank gave you the information from the policies in its possession? A. That is correct.

Q. And so far as known to you, the Inheritance Tax Division of the State of California and the Federal Estate Tax Division tax returns have been accepted, at least to this point, by those bodies, have they?

A. Yes, apparently, to the best of my knowledge.

Mr. Angell: I will now offer this statement in evidence as Plaintiff's Exhibit 8.

Mr. Clausen: Just a moment. Counsel, may I see that? I just want to make sure, Mr. Robinson, this document you have just identified and held in your hand, Plaintiff's 8, does not purport—I will ask the question this way: You [513] didn't prepare this with any audit? This is no audit, is it?

A. You are correct; there was no audit made.

Q. And, as a matter of fact, you didn't verify the records?

A. To the extent that the entire tax affidavit I submitted, for example, as a public record, I would consider that verification.

(Testimony of William G. Robinson.)

Q. Well——

A. It would be a—it would not be a correct statement to say that none of this information was verified, no.

Q. Then when this statement under your letterhead states here: "This statement was prepared from the records of William M. Houston and Charlotte S. Houston and from data compiled for the purpose of probating the estate of William M. Houston, deceased, without audit or other verification of such records or data," that is incorrect?

A. I am not sure. What is incorrect?

Q. I am asking you—you just said it was not correct to state that it was not verified.

A. I said it was not correct to state it was prepared without any verification. However, that statement there doesn't say it in exactly that way.

Q. Well, the statement I just read——

A. It states that every item involved was not the subject of an independent verification.

Q. Well, would you find the word "item" in there for me? [514] This is on your letterhead?

A. That is correct.

Q. Is the word "item" in there?

A. No; it is correct that, except to the extent that this information was verified by reference to the data submitted in connection with the inheritance tax affidavit, there was no verification other than that. I see what you are—that is what it states.

Q. Mr. Robinson, all I want to do is to find out what is the situation.

A. Yes.

(Testimony of William G. Robinson.)

Q. I am reading your own typing here. It says here: "The statement was prepared from the records of William M. and Charlotte S. Houston and from data compiled for the purpose of probating the estate of William M. Houston, deceased, without audit or other verification of such records or data." A. I say that——

Q. Pardon me.

A. That statement is correct as it stands there, and the words "other verification" means that the extent of the verification was limited to the examination of the records entering into the probating of the estate, the preparation of the inheritance tax affidavit, the preparation of the federal estate tax return, and the preparation of related income tax returns. [515]

Q. Is there any reason, Mr. Robinson, why you did not sign this?

A. I am afraid that was simply an oversight.

Mr. Angell: Maybe this is a copy.

Mr. Clausen: No, that is the original, unsigned.

Mr. Angell: Yes, this is. Have you any objection to Mr. Robinson signing it now?

Mr. Clausen: I have no objection. I am just trying to find out.

Mr. Angell: Yes, I am sorry that I overlooked it. I would prefer that it be signed. You did write this letter, didn't you?

A. I did write that letter, and how it didn't get signed was an error in the office.

(Testimony of William G. Robinson.)

Q. Have you any objection to signing it here?
Have you got a pen?

A. No, I haven't.

Q. Suppose I gave you one. That certification which you are signing, Mr. Robinson, is the usual certification of a certified public accountant where they haven't actually audited the accounts and verified them by letters to the people who are shown as debtors and the like?

A. That and other procedures considered necessary for the conduct of an audit.

Q. The claims shown in here against the estate are for [516] the most part claims filed against the estate and paid; is that correct?

A. That is correct.

Mr. Angell: I now offer this in evidence.

The Court: It will be admitted and marked.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

(Statement prepared by William G. Robinson was admitted in evidence and marked Plaintiff's Exhibit 8.)

ELLEN MAY HOFFMAN

called as a witness on behalf of the plaintiff; sworn.

The Court: Your name, please?

A. Ellen May Hoffman.

The Court: Where do you live?

A. 1667 Thirty-First Avenue, San Francisco.

The Court: Your business or occupation?

A. I am a secretary.

(Testimony of Ellen May Hoffman.)

The Court: Take the witness.

Direct Examination

Mr. Angell: I am trying to find my notes here, your Honor. They are a little bit extensive.

Q. Miss Hoffman, what is your business or occupation?

A. I am a secretary—executive secretary.

Q. And to whom are you secretary now?

A. To the United States manager of the New Zealand Insurance [517] Company, Mr. Richard B. Masters.

Q. He is the gentleman who has testified here before, is he? A. Yes, he is.

Q. Were you ever secretary for Mr. Houston when he occupied that position?

A. Yes, I was.

Q. How long were you a secretary of Mr. Houston?

A. I had been secretary for Mr. Houston a little more than ten years, since about April, 1943.

Q. And at the time you went to work for Mr. Houston as a secretary, was that with the New Zealand Insurance Company?

A. No, it was not.

Q. Who was that with?

A. That was with the Fire Association of Philadelphia.

Q. And ever since that time you were continuously secretary to Mr. Houston? A. Yes.

Q. To the time of his death, is that right?

(Testimony of Ellen May Hoffman.)

A. That is correct.

Q. Were you what would be defined as a confidential secretary?

A. Yes, I am personal confidential secretary and take care of all confidential matters of the company as well as the manager. [518]

Q. And mail coming in to Mr. Houston marked "Confidential" and "Personal," would it be part of your job under Mr. Houston's standing directions with you to open that mail and see what it was?

A. I opened everything regardless of how it was marked.

Q. And that would be whether it was marked "Personal" or "Confidential" or not?

A. Yes; it didn't make any difference; I opened every envelope that was addressed to him.

Q. Directing your attention to the Friday before Mr. Houston's death, which would have been Friday, February the 20th; is that correct?

A. The 19th.

Q. 19th. Did you work on that day?

A. Yes, I did.

Q. All day?

A. All day and up until about eight-thirty that night.

Q. And did Mr. Houston work on that day?

A. Yes, he did.

Q. And what time did Mr. Houston leave?

A. He left about six o'clock.

Q. And did you observe Mr. Houston's manner and demeanor on that day?

(Testimony of Ellen May Hoffman.)

A. Yes. He was the same as he had been before, his usual, jovial self. [519]

Q. Did you notice any depression or melancholia? A. No.

Q. Or worry? A. No.

Q. Did you notice any difference in his actions or manner than he ever had?

A. No, there wasn't anything different about his manner that day than any other day.

Q. How would you describe Mr. Houston in his attitude and disposition around the office, just generally, Miss Hoffman?

A. Well, he was a very energetic man. He had a job to do and he felt that he must do it, and he did it very well; and he was very considerate of other people and I would say that he was a man with a heart.

Q. Would you describe him as a nervous person, or a man who took his work more or less in stride without too much worry or show?

A. No; he did things as he came to them and he didn't worry about them before he came to them at all. I mean he took one job and did his work in stride.

Q. On the afternoon of Friday, the 19th of February, 1954, prior to Mr. Houston leaving his office, did Mr. Houston have any discussion with you as to the work for the following week?

A. Yes; after five o'clock he was sitting in front of my desk and we were talking about, oh, many things, but he did [520] say that he wanted to

(Testimony of Ellen May Hoffman.)

write a letter to the head office and he wanted to—in that letter he wanted to put forth his ideas for the following year, for the year 1954. And so I told him that if he wanted to write that letter, that since I was coming in to work the next day anyway, but if he wanted to come over that I would write the letter and we could get it off in the mail because we have to consider the airmail service to New Zealand. It doesn't go every day like it does here. He said no, that it wasn't that important; that we would write it Tuesday. And then of course that next week also the annual statement on all the forms that must go with that statement as well as the letters had to be signed and had to be in the mail, and that is what we were going to do.

Q. And he was going to write the home office to lay out the program for business or a suggested program for 1954? A. That is right.

Q. Is that correct? A. That is correct.

Mr. Angell: If your Honor please, I have an attorney here who gives me a note that he is very busy. He will be a very short witness and he asked me if he might be called now because he has an important engagement back at his office this afternoon. May I withdraw this witness and put this gentleman on?

Mr. Clausen: So far as I am concerned, it is certainly satisfactory with me, your Honor. [521]

The Court: You may step down.

Mr. Angell: Mr. Levit.

BERT W. LEVIT

called as a witness for the Plaintiff; sworn.

The Court: Proceed.

Direct Examination

Mr. Angell: Q. Mr. Levit, what is your business or profession?

A. I am a lawyer.

Q. And where do you reside?

A. I live at 901 California Street, San Francisco.

Q. How long have you been admitted to the bar of California?

A. I was admitted to the California bar in 1925.

Q. And have you practiced your profession here in all the courts, the state and federal courts, since that time?

A. With the exception of one year which I spent in Washington as a special assistant to the United States Attorney General.

Q. Did you know Mr. William Houston in his lifetime? A. I did.

Q. And in what capacity did you know him?

A. Well, I knew him in a friendly way and I also knew him as a client and as an official of organizations that were also clients of mine.

Q. You do considerable insurance practice, do you not?

A. We have a general practice, but we do a good deal of [522] insurance work, yes.

Q. Have you over the past several years seen Mr. Houston both socially and in a business way?

(Testimony of Bert W. Levit.)

A. Yes. I think I should say that when I say "socially" I don't mean that we ever exchanges visits personally in our homes, or anything of that kind, but the fire insurance people do gather for lunch not infrequently at certain places, certain clubs, and also they occasionally have dinners to honor retiring members, and also they have annual meetings of their associations which are not infrequently held out of San Francisco and which constitute as much social affairs in a way as they do business affairs.

Q. In other words, your social activities with him were in connection with business primarily; is that correct? A. That is correct, yes.

Q. And then you saw him in your office and in his office?

A. I can't recall whether Mr. Houston was ever in my office, although I think he was on more than one occasion. However, I was in his office on several occasions when we were handling matters for his company.

Q. Over what period of time had you known Mr. Houston prior to his death?

A. Well, I don't remember exactly the year that he came here to San Francisco, but he was, I know, the *manner* of the Fire Association of Philadelphia, and I am quite sure that I made [523] his acquaintance very shortly after he arrived.

Q. Will you in your own words state for the Court and the record what you observed as to Mr. Houston's demeanor and attitude as you saw him

(Testimony of Bert W. Levit.)

through those years, as to whether he was a happy person or an unhappy person?

Mr. Clausen: Your Honor, my objection to this same kind of testimony has been made before. I won't remake it if it is understood it runs to this line.

The Court: Well, I allowed both sides considerable latitude in that respect to accommodate the case.

Mr. Clausen: All right, your Honor. May it be understood my objection runs to this line?

The Court: Let the record so show.

A. Well, I would say that as between the two classifications of being a happy or an unhappy person, he always impressed me as being a happy person.

Mr. Angell: Q. Did you ever see Mr. Houston when you would call him depressed, melancholy or in a bad mental state?

A. No, sir, I never did.

Q. And would you describe Mr. Houston as an extrovert or an introvert?

A. Well, I wouldn't say that he was an extremist on either side. I didn't consider—there is nothing that I could put my finger on to say that I would consider him either one or the other. [524]

Q. But when he was with the insurance group in these insurance company activities, did he seem to enjoy taking part in them?

A. Oh, very definitely. He participated in the normal business gatherings and in the normal social

(Testimony of Bert W. Levit.)

gatherings at these meetings, and so far as I was able to observe, no differently from anyone else.

Q. Did you ever hear Mr. Houston——

A. He was friendly, I would say that. He was certainly a very friendly person to those with whom he came in contact.

Q. Did you ever hear Mr. Houston express any desire or intent to commit suicide?

A. Never.

Q. And did you observe Mr. Houston's drinking habits at the time he was with you and that you saw him?

A. Well, I can't—I can't say specifically that I remember ever seeing him take a particular drink. I certainly would have observed it had he not taken a drink when other people were drinking, because I have seen him at these meetings when people were having a few drinks and I observed no difference between Mr. Houston's habits in that regard and the others. And I observed that these people were all quite sober people. In other words, I never saw Mr. Houston at any time under the influence of liquor in any degree.

Mr. Angell: That's all. [525]

Cross-Examination

Mr. Clausen: Q. Just one question, Mr. Levit. Did you ever journey with Mr. Houston to Lakeview, Oregon?

A. Did I ever go with him?

(Testimony of Bert W. Levit.)

Q. Yes, sir.

A. No, sir, I didn't.

Mr. Clausen: That's all.

The Witness: Thank you very much, your Honor.

The Court: It is time for adjournment now. We will take an adjournment until two.

(Thereupon an adjournment was taken to 2:00 o'clock p.m. of the same day. [526])

ELLEN MAY HOFFMAN

recalled as a witness for the Plaintiff; previously sworn.

Direct Examination—(Continued)

Mr. Angell: Q. On the Friday before Mr. Houston's death, you have testified that you worked all that day and so did Mr. Houston, and I will ask you if on that day you observed Mr. Houston's demeanor and manner.

A. Yes, I did.

Q. Was it pleasant or unpleasant? Did it seem as though he was worried or melancholy or depressed in any way?

A. No, he was himself. He was very pleasant, very jovial.

Q. Do you know of any appointments or activities that Mr. Houston was planning for the following week?

A. Well, we were going to write that letter that I have mentioned, and we were going to continue with the signing of the annual statements and all the papers because of the fact that there is a dead-

(Testimony of Ellen May Hoffman.)

line to meet, and if the companies do not meet the deadline they are going to get into difficulty; so those had to be filed before the end of the week, or in the mail.

Q. Did he have an appointment with anyone that you know of for a meeting?

A. Well, he was—yes, he was going—on Wednesday he [527] was going to meet a gentleman that was coming down from Oregon and was going to work with the southern Oregon ranches. And I don't think the other gentleman in southern Oregon, he never knew the man, so he was going to introduce him.

Q. Now, on the annual report—did you get out any of that annual report?

A. Yes, I fill out all the certificates—applications for certificates of authority. In other words, that is the company license portion. I fill in those forms myself.

Q. Did you assist Mr. Houston in getting out the forms and annual reports each year in the part that he had to do? A. Yes, I did.

Q. And did you observe anything different in connection with the annual report this year, in the one being prepared at the time of his death, and any of the years before?

A. He felt that—in comparing the figures that he would receive monthly, he felt that the report was not bringing enough commissions into the New Zealand Insurance Company, and so he went up to

(Testimony of Ellen May Hoffman.)

the accounting department to find out why, and he looked over the statements and discovered the error, so they had to send about six pages out to the photographer's to be redone, and he was a little annoyed at the accounting department.

Q. Was he depressed about it?

A. No. [528]

Q. Nervous? A. No.

Q. Was it an error in the accounting division or controlling division?

A. It was an accounting error.

Q. Was it the common habit or part of his duties, Miss Hoffman, to make these adjustments and see that the report was in proper shape?

A. Yes, because he is the official who signs the annual statement form itself as well as the tax form and he is the individual held accountable by the state.

Q. I think you testified that you offered to work on the Saturday following to get out anything he needed; is that right? A. Yes, that is true.

Q. At any time, say the last several weeks before Mr. Houston's death, did you notice any particular nervousness or any depressive or morose attitude or feeling? A. Oh, no, no.

Q. Anything different than you always saw in Mr. Houston?

A. No, he was as pleasant as usual, was cordial to everyone.

(Testimony of Ellen May Hoffman.)

Q. Did Mr. Houston ever complain to you or state that he had any financial difficulties?

A. No, no.

Q. Or any other kind of difficulties?

A. No. [529]

Q. Did he ever make any statement that he would do away with himself, or commit suicide, or that he felt as though he wanted to, or anything of that kind?

A. I never heard him make such a statement.

Q. Do you know whether Mr. Houston was offered the presidency of any company, insurance company, shortly before his death?

A. Yes, he was.

Q. What company was that?

A. Fire Association of Philadelphia.

Q. And what did he say?

A. He said that he was refusing the presidency because he felt the Pacific Coast was the best place to live and that he had made a commitment to the New Zealand Insurance Company that he intended to keep.

Q. Were you in the office when directors and officers of the New Zealand Insurance Company would come from New Zealand and meet here or be here with Mr. Houston? A. Yes.

Q. Did you have occasion to be present when they were in discussions or observe any activities together?

A. Yes, because I met all of them.

(Testimony of Ellen May Hoffman.)

Q. And what was their attitude as you observed it toward Mr. Houston?

A. Oh, they were always very cordial, very friendly. In fact, they didn't come here in an actual company capacity. The [530] only one who came here in an official capacity was the general manager; the others came here merely passing through the United States.

Q. Under the form of corporation which the New Zealand Insurance Company was formed, the managing director is such traveling wherever he is in the world; isn't that true?

A. That is correct.

Q. And did you ever notice any shells of any kind in Mr. Houston's desk?

A. Yes, he kept them in the bottom of one of the drawers where he kept the blank checks.

Q. You had a chance to observe Mr. Houston's drinking habits? A. Yes.

Q. Where would you be on occasions?

A. Oh, well, there were various social occasions, such as Christmas parties or maybe company banquets, something like that.

Q. And at such times as you ever saw Mr. Houston drink, would you state in your own words how many would you say he took?

A. Oh, he might have one or two drinks, maybe three.

Q. Did you ever see him intoxicated?

A. No, I have never seen him intoxicated and

(Testimony of Ellen May Hoffman.)

never seen him to the point he couldn't handle himself.

Q. Did you ever see him when he couldn't walk straight or talk straight? [531]

A. No, I never did see him falter in his walk or hear him falter in his speech.

Q. Do you know whether Mr. Houston was planning to take a trip to Honolulu?

A. Yes, he was planning to go to Honolulu on the Lurline and he was taking Mrs. Houston with him.

Q. I will show you a letter dated December 10th, 1953, or a carbon copy of one, and I will ask you if you wrote that letter—the original of that letter, of that carbon.

A. Yes, I wrote that letter.

Q. And did you there make reservations for a trip on May 24th on the Lurline for Mr. and Mrs. Houston to go to Honolulu?

A. I had made the reservations earlier, but this was the deposit for the reservations.

Q. You had made the reservations already?

A. That is correct.

Q. And did those reservations remain in effect until after Mr. Houston's death?

A. Yes, until February 24th when I called.

Q. And then did you get the refund from——

A. Yes, and we received a refund on March 5th, 1954.

Q. And will you for the record explain these pencil and ink memos here which do not constitute

(Testimony of Ellen May Hoffman.)

part of the record, just so it will be clear in the record?

A. Well, I had a marking up here on the upper right-hand [532] corner to attach to the suspense file, because this letter being written on December 10th and enclosing \$50.00 deposit toward another file, and I wanted to be sure that it would come up in suspense so we would be sure to pick up the tickets, and I had it marked first for 2/10, and then I had changed it to March 10th, or 3/10, as I have it here.

Q. That was followup to get the ticket?

A. That was a followup to be sure to get the tickets. Then I had this marked as "General file," which meant it was going to the regular general file. And then I have explained before what I did on February 24th, 1954, and a refund received March 5th, 1954. And I don't know what this other pencil mark on here means, but it is my writing. It looks like "NAG" or something.

Mr. Angell: I ask that this go into evidence as Plaintiff's next in order.

The Court: Let it be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 14.

(Letter dated December 10, 1953, received in evidence and marked Plaintiff's Exhibit 14.)

Mr. Angell: I think that is all.

(Testimony of Ellen May Hoffman.)

Cross-Examination

Mr. Clausen: Q. Miss Hoffman, did you ever observe Mr. Houston at Lakeview, Oregon?

A. No, I did not go up to Lakeview. [533]

Mr. Clausen: That is all.

Mr. Angell: No further questions.

Mr. Utley.

HARRY A. UTLEY

called as a witness on behalf of the Plaintiff; sworn.

The Court: Your full name, please?

A. Harry A. Utley.

The Court: Spell your last name.

A. U-t-l-e-y.

The Court: Where do you reside, Mr. Utley?

A. Lakeview, Oregon.

The Court: Your business or occupation?

A. Yes. I am in the real estate, farming and timber business.

The Court: How long have you been so engaged?

A. About fifty years.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. How long have you lived in Lakeview, Oregon? A. Since 1908.

Q. How old are you now, Mr. Utley?

A. Past 72.

Q. Did you raise a family in Lakeview?

A. Yes. [534]

Q. And your home is there?

A. That's right.

(Testimony of Harry A. Utley.)

Q. And where is your home located in Lakeview?

A. It is in Goldmore Terrace, about a mile and a half north of Lakeview in a subdivision.

Q. And will you just tell briefly, what kind of a home is that, Mr. Utley? What is it built of? Describe the home.

A. Well, it is a large rock home, heated with a natural hot water from a geyser and it has fifteen rooms. It's a very lovely home.

Q. Do you have a projection room there to show pictures and to entertain in?

A. Yes, I have a big party room in the basement.

Q. And during the course of years have you entertained people coming to Lakeview?

A. Lots of hunters and fishermen.

Q. Through all the years?

A. Through all the years.

Q. Will you just describe the location of that home with respect to Goose Lake and the farms that you are interested in down in the valley there?

A. Well, it is rather up on a hill and overlooks our Hunters Hot Springs, and there is some lakes there that have lots of honker geese on the year around, and it overlooks the valley, and down at the south is Goose Lake, which is partly [535] in Oregon and partly in California.

Q. Looking down over that, is there a large ranch of which you were one of the owners?

A. Yes

(Testimony of Harry A. Utley.)

Q. What is that ranch?

A. The Bernard Ranch right joining the hotel.

Q. How big a ranch is that? A. 800 acres.

Q. And during the years that you have been there you have had many guests there, have you not, at your place?

A. Lots of guests during hunting season and fishing.

Q. What are your business activities there?

A. I am in the real estate and insurance business and do a lot of timber work.

Q. And are you in any way connected with the Savings & Loan Association there?

A. Yes, we have a Federal Savings & Loan—Lakeview Federal Savings & Loan.

Q. What is your relationship with that?

A. We just have it in our office.

Q. When you say “we” who do you mean?

A. My partner and I.

Q. That is a Federal Savings & Loan organized under federal statute, is that right?

A. That’s right. [536]

Q. Home Loan Bank Act?

A. That’s right.

Q. Have you any other activities? Are you identified with any corporations?

A. Yes, several.

Q. Will you just state briefly and quickly what they are?

A. The Southern Oregon Ranches is a separate ranch deal that I am interested in with some other

(Testimony of Harry A. Utley.)

California men and we raise cattle—pure bred Hereford cattle.

Q. T-Bone Ranch?

A. T-Bone Ranch, and the Southern Oregon Ranch.

Q. And was Mr. Houston associated with you prior to his death in the T-Bone and the Southern Oregon Ranches? A. That's right.

Q. And did you make money out of those ranches? A. Yes, we did all right.

Q. And could you just tell us—in one year you made a very good sum there, did you not, in grain?

A. Yes.

Q. Which ranch was that?

A. That is the Southern Oregon Ranch.

Q. And about what did you produce out of that ranch? A. Grain principally.

Q. Yes, but how much? How much of a crop did you take off?

A. Oh, about a \$12,000 crop. [537]

Q. And what did you pay for the ranch?

A. 21,000.

Q. And were you planning to expand the operations at all at the time of Mr. Houston's death?

A. Yes, we had plans on buying any other ranch that was cheap around there that we thought was a reasonable buy and expanding.

Q. Did you have any ranch in particular in mind that you were discussing with Mr. Houston?

A. Yes.

Q. Just prior to to his death?

(Testimony of Harry A. Uteley.)

A. Several other ranches.

Q. Can you name one or two of those?

A. Well, we were going to buy the Laird Ranch in Warner Valley. That is just east of Lakeview. I think it was about \$225,000 and Mr. Houston was going in along with us on the deal.

Q. And were you present when he made arrangements for the financing of a part of that ranch?

A. Yes; he called his father in Denver and was able to get at least \$30,000.

Q. When did you first meet Mr. Houston up at Lakeview?

A. At Lakeview?

Q. Yes.

A. Oh, I don't know. It is about ten years ago. He was [538] with the Fire Association--manager of the Fire Association, and he liked to hunt and fish, and I invited him up there.

Q. You also have an insurance business, have you not, in connection with your business?

A. Yes.

Q. That is the largest insurance business in and about that place, is it?

A. It is the largest in Lake County, yes.

Q. So you met Mr. Houston in connection with insurance; is that right?

A. That's right.

Q. Through the years after you first met him, did your association develop so that you spent more time together or less?

Q. What was that question again?

(Testimony of Harry A. Utley.)

Q. Through the years after you met Mr. Houston and prior to his death, did your relationship become closer or further away? Did he come to spend a good deal of time with you when up there?

A. Oh, yes, we became very close friends. He loved to hunt and fish, and so did I and he loved horses and rode them and we hunted deer horseback, and everything that he liked to do, seemingly I liked to do, and so we was great friends and pals.

Q. Was he often a guest in your home? [539]

A. Yes, very often.

Q. And what did your family consist of, Mr. Utley, at that time during the earlier years when he was up there? Who was there in the house?

A. I have a son and two daughters.

Q. Two daughters?

A. Two daughters.

Q. Just give their names, if you will.

A. Virginia Wilkerson is one, and Phyllis White is my oldest daughter.

Q. Your son? A. Bob Utley.

Q. Robert? A. Robert Utley.

Q. What business is he engaged in?

A. He is in the insurance business.

Q. And where? A. In Portland.

Q. And do you know what company he works for, if any?

A. Yes, he works on the estate work for the Canadian Life Insurance Company.

Q. I will show you Defendant's Exhibit C which is an application for a life insurance policy,

(Testimony of Harry A. Utley.)

which application is dated Portland 5, Oregon, 18 September 1953, and I will ask you if the signature appearing on the lower lefthand side of that as a [540] witness to the signature of Mr. Houston on that application was your son.

A. That's my son Robert.

Q. Were your children in the home there through the years when Mr. Houston used to come up and stay with you? A. Yes.

Q. And was Robert among them?

A. Yes, often.

Q. Did he ever accompany you and Mr. Houston on trips?

A. Yes, lots of hunting trips.

Q. And you have stated that you used to have a great many guests up there. Referring now to the times when Mr. Houston was up there, will you state very briefly some of the guests that you had in your home when Mr. Houston was there?

A. At one time I remember we had Robert Noyes of the Crown Zellerbach Paper Company. We had Robert McCormick. His father was of the McCormick Steamship people. Jack Meyer of Meyer & Frank in Portland, and Paul Weyerhaeuser of Weyerhaeuser Timber Company. They would come down about every year and go hunting with us, and many others.

Q. Douglas McKay?

A. Yes, Douglas McKay.

Q. What is his present position?

(Testimony of Harry A. Utley.)

A. He was the governor when he was down there.

Q. Governor Hall? [541]

A. Governor Hall.

Q. Justice Douglas?

A. Yes, Justice Douglas.

Q. Did you have some attorneys there from Eureka, California?

A. Yes, Hoover and Goodwin—they are attorneys from Eureka—and Rudy Abrahamson who runs the White House there—it is a large store in Eureka. They fly up there every year and go duck hunting with us.

Q. And would you have Mr. Houston stay all night in your home on many occasions?

A. Oh, yes.

Q. And he also acquired a cabin, did he not, right out near one you had?

A. That's right.

Q. Near the fishing?

A. That's right.

Q. What river is that on?

A. On Sprague River.

Q. And how far apart were your cabins?

A. About a mile.

Q. Would you see a great deal of each other when you were out there both occupying those cabins?

A. Yes, we hunted and fished together all the time.

(Testimony of Harry A. Utley.)

Q. And do you know whether Mr. Houston brought guests up from here to his place? [542]

A. Yes, quite a few guests.

Q. Mrs. Houston and the daughters?

A. That's right.

Q. And Don Campbell? A. Yes.

Q. Was he in your place many times?

A. Many times.

Q. And did Mr. Houston ever bring his insurance agents of the New Zealand Insurance Company up there?

A. Yes, he has. He had Sir James Gunson from New Zealand with him at one time.

Q. And he is one of the directors of the New Zealand company?

A. He is chairman of the board of New Zealand Insurance Company.

Q. And they went all around and hunting and fished from your house?

A. Yes, we hunted and fished together.

Q. Entertained them socially at social events?

A. Yes, sir.

Q. Did you see that Mr. Houston acted any different on those occasions with respect to drinking than he did when Sir *Dennison* wasn't there?

A. No, just the same.

Q. You recall the incident of an automobile accident that was mentioned, or do you remember that Mr. Houston had an [543] automobile accident?

(Testimony of Harry A. Utley.)

A. He mentioned it to me but I didn't know any particulars.

Q. At the time of that accident did Mr. Houston have a number of insurance men up there at Lakeview with him?

A. Yes, he had some agents—one agent from the South that had a new Cadillac and he was taking him around a lot showing him the country, and it was all so different down in Georgia.

Q. Were other agents there at that time, too?

A. Yes.

Q. You had great opportunity to observe Mr. Houston, did you not, as to whether he was a happy person or an unhappy person?

A. Oh, yes.

Q. Would you describe for the Court just how you could classify Mr. Houston with respect to whether he was depressed or morbid or a person worrying?

A. Well, he was always a very cheery person. He always had something doing. He was always active and he always had some plans on going sage hen hunting or duck hunting or deer hunting. He was a very cheery and thorough business man.

Q. And did you ever see anything in the nature of a Dr. Jekyll and Mr. Hyde in Mr. Houston, would you say? A. No, no.

Q. And how did he dress when he came up there?

A. Well, he always come up during the round-up and we all put on our jeans and five gallon

(Testimony of Harry A. Utley.)

hats and of course entered [544] right in with the spirit of the occasion. And he was usually there when the Four-H boys—when the Rotary Club would sell the Four-H stock, and we bid in some of those choice steers at two or three times what they were worth just so the kids would get a big price for their stock. We had a lot of fun doing it.

Q. And did Mr. Houston kind of enter into the spirit of the affairs there that he went to with you? A. Yes.

Q. Would you say that he acted the same or different than other people that were joining in those activities?

A. No, he usually fit into the occasion.

Q. Did you ever see him wear a coonskin cap?

A. No. Lots of big five gallon hats.

Q. What would you call them? Cowboy hats?

A. Cowboy hats.

Q. What were they? Stetsons? A. Yes.

Q. Did they have a name for them? Five-H Stetson or something?

A. Oh, I don't know.

Q. You don't know the name. Do you remember the incident of Mr. Houston firing a revolver in your office?

A. Yes, one time up with—he had a .22 with some blank shells and he came in the office with some of his friends from San [545] Francisco and he fired the gun off just for the fun of it in the office. They all knew he was there.

Q. He fired it as a salutation, a greeting?

(Testimony of Harry A. Utley.)

A. That's it.

Q. That he had arrived?

A. Yes. We were all having a lot of fun about it.

Q. And that was all in a joking spirit, was it?

A. That's right.

Q. What was the last time you saw Mr. Houston alive?

A. Well, I think that he and I brought the horses down in the fall of the year to Berkeley.

Q. And that is the last time you saw him before his death?

A. I think we had two trailers and the horses.

Q. At that time you saw nothing unusual or different in his manner or in his spirit?

A. No.

Q. Had you communicated with him by phone at all between then and the date of February 22, 1954?

A. Well, I was on a trip to South America when he passed away.

Q. Oh, I see. You got married, didn't you, and you were gone? When you came back to San Francisco from that trip were you entertained here by Mr. Houston?

A. No, he passed away when I was in Brazil.

Q. And all the years that you knew Mr. Houston had you ever [546] seen him drunk?

A. No.

Q. Did you ever see him under the influence of

(Testimony of Harry A. Utley.)

liquor to the point where he staggered or was incoherent?

A. No. We had social drinks together but he always could handle himself with wonderful shape. I never saw him where he couldn't.

Q. By the way, Mr. Robert Utley's wife used to work for Mr. Houston, didn't she, before they were married?

A. That's right. When he was to the war.

Q. While he was off in the service Mr. Robert Utley's wife came down and worked for Mr. Houston, is that right?

A. That's right.

Q. You said you were associated with Mr. Houston in these farming ventures and that you had planned and were planning to expand those activities; is that right?

A. That's right.

Mr. Angell: I think that is all.

Cross Examination

Mr. Clausen: Q. Mr. Utley, do you drink yourself? A. Occasionally, yes.

Q. Seldom, is that right?

A. Just once in a while.

Q. The girl who testified by deposition in this case, Virginia Wilkerson—is she your daughter?

A. That's right.

Q. And your home is across the street, is it not, from a so-called Hunter's Lodge?

(Testimony of Harry A. Utley.)

A. Near Hunter's Lodge.

Mr. Clausen: That is all.

Mr. Angell: That is all. Thank you very much.

Mr. Taylor.

EVANS M. TAYLOR

called as a witness on behalf of the plaintiff; sworn.

The Court: Q. Your full name?

A. Evans M. Taylor.

Q. And where do you reside?

A. In Piedmont.

Q. And your business or occupation?

A. Attorney.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. You are an attorney, are you not? A. Yes.

Q. Where is your office?

A. 311 California Street.

Q. What is the firm name?

A. Thornton & Taylor.

Q. And Mr. Thornton is an old, old member of this bar who passed away a short time ago; is that right? [548] A. That's right.

Q. And how long have you been admitted to the bar of California, Mr. Taylor?

A. Some 25 years or more.

Q. And practiced right here in San Francisco?

A. Yes, sir.

(Testimony of Evans M. Taylor.)

Q. Admitted to all the courts of the State of California and Federal? A. Yes.

Q. You are an officer of this court?

A. That's right.

Q. Did you know Mr. Houston?

A. Yes, sir, I did.

Q. And when did you first meet him?

A. I would think probably 10 or 12 years ago.

Q. And in what capacity did you meet him?

A. Well, at that time I believe he was associated with the Fire Association of Philadelphia, and our firm for many years had represented that company as well as a number of others.

Q. In the course of the years from when you first met him up to the time of Mr. Houston's death, did you see him during those years frequently? A. Yes, I did.

Q. And would that be socially or in business matters? A. In both matters. [549]

Q. And you attended social functions with him?

A. Yes, I did.

Q. Were you ever in his home?

A. I have.

Q. You know Mrs. Houston?

A. I do, yes.

Q. And what family have you?

A. I have a wife and a son and a daughter.

Q. And did you have Mr. and Mrs. Houston in your home?

A. They have been in my home on occasions.

Q. And entertained them? A. Yes, sir.

(Testimony of Evans M. Taylor.)

Q. And you went on social functions together in the insurance world? A. We did that.

Q. And you were present at a great number of insurance company conventions where the insurance fraternity gathered like the Bar Association have their annual conventions?

A. A number of such events, yes.

Q. And you likewise were attorney for the New Zealand Insurance Company?

A. That's right.

Q. And in connection with that you had occasion to do business with Mr. Houston as the manager of the United States for that company?

A. I did.

Q. And did you have, would you say, a fair opportunity to observe Mr. Houston as to his nature and conduct, as to whether you would say he was a depressed man or a morbid man or a morose and melancholy man?

A. I did have a number of occasions to observe him, yes.

Q. And would you just state in your own language a word picture of how you would describe the characteristics of Mr. Houston with respect to his emotional moods?

A. Well, I would say he was essentially a very friendly person, a person who not only seemed to enjoy things and events but thoroughly enjoyed people, and an active person.

Q. Would you call him a depressed person?

A. Not in any sense.

(Testimony of Evans M. Taylor.)

Q. Did you ever see him depressed?

A. No, I wouldn't say that I ever saw him depressed.

Q. Did you ever see him morbid?

A. No.

Q. Did you ever hear him say he would take his own life or commit suicide?

A. No, sir, I never have.

Q. Did he ever express in any way a desire to remove himself from his environment?

A. No indication of that character in any respect.

Q. Did you observe him to be happy in his business life? [551]

A. He seemed to be a thoroughly happy soul.

Q. And his wife and family?

A. Oh, yes.

Q. You were in business also with Mr. Houston, were you not?

A. Yes, we had some ventures.

Q. You saw him, as a matter of fact, the day before he died, did you not?

A. That is true.

Q. In what business activities were you associated with Mr. Houston?

A. I have heard mention here of the Southern Oregon Ranch and T-Bone Ranch, and we were associated in those ventures.

Q. Were you substantially or a substantial owner in those? A. I think so.

(Testimony of Evans M. Taylor.)

Q. How did you come to make those investments in those ranches?

A. Those were primarily made through my friendship and affiliation with Mr. Houston.

Q. Do you know anything about farming yourself? A. Nothing whatever.

Q. Did you own any interest in any farm or ranch properties prior to associating yourself with Mr. Houston? A. No, sir.

Q. Did you depend implicitly upon Mr. Houston to carry that project on to success? [552]

A. Decidedly so.

Q. And who was in that project with you and Mr. Houston in the T-Bone? Take that first.

A. Well, I believe originally—there were some variations; there was Mr. Wilkes, Mr. Utley, Mr. Houston and myself.

Q. Was that Mr. Harry Utley who was just on the witness stand?

A. Who has just left the witness stand, yes.

Q. You said there were some variations. At the time of Mr. Houston's death, how was that stock owned?

A. I believe it was in that form then.

Q. Did you all own about an equal interest in it?

A. About an equal interest, yes.

Q. And there was Mr. Wilkes?

A. Mr. Wilkes.

Q. And what is Mr. Wilkes' first name?

A. Gilbert.

(Testimony of Evans M. Taylor.)

Q. Is he in this courtroom now?

A. He is. He is sitting there.

Q. And did Mr. Houston meet with you on a Sunday out at Mr. Wilkes' home in Orinda, just the Sunday before his death?

A. He did that, yes; we had a meeting there.

Q. And before we go into the events that occurred there, I would like you to state in your own language, if you can, the drinking habits of Mr. Houston as you observed them over the [553] last four or five years before his death?

A. I would say that his habits were habits of social drinking. I have never seen him intoxicated and I have never seen him in a position where he did not appear to have all his faculties.

Q. And you went to many, many cocktail parties, did you not, and at these meetings with these insurance people? A. Quite a few.

Q. Did you ever see him intoxicated at any of those? A. No.

Q. Did you ever see him when he didn't have full control of his mental capacities or ever talked incoherently? A. No, sir.

Q. Or did you ever see him where he couldn't drive his car? A. I have not.

Q. Now, going to the Sunday prior to Mr. Houston's death, what time did you arrive out at Mr. Wilkes' place?

A. Generally speaking, I would think it must have been somewhere around 2:00 o'clock in the afternoon.

(Testimony of Evans M. Taylor.)

Q. Where did Mr. Wilkes live?

A. He lives in the Happy Valley section over in Contra Costa County near Lafayette.

Q. That is the little valley there off to the left of the road where you go up from the nursery there, is it?

A. That is true, and to the north of the highway. [554]

Q. And Mr. Stanley Baller lives up in there?

A. Somewhere in that general area.

Q. And Mr. Henry Kaiser has a large home up in there, has he?

A. I understand he has.

Q. Now, what did you meet out there? What was the occasion of that meeting?

A. Well, primarily it was for the purpose of going over the planting program for the ranches for the next season. It was necessary to determine not only what kind of a planting program we were going to have, but also there was some discussion as to whether we were going to expand the stock that was run on one of the ranches, and Mr. Houston being primarily familiar with that, he had arranged for Earl Hawks who was looking after the place up there to come down and visit us and give us first hand information in San Francisco.

Q. That is Earl H-a-w-k-s, Hawks?

A. Right.

Q. Where was Earl Hawks' residence?

A. He was residing on a ranch of his own that was adjacent to one of the properties at Lakeview.

(Testimony of Evans M. Taylor.)

Q. You say you were planning to meet with Mr. Hawks here in San Francisco?

A. That's right, yes.

Q. To discuss further development of the ranches up in the Lakeview region; is that right?

A. That's right.

Q. And was there anyone present at that meeting other than Mr. Wilks, Mr. Houston and you?

A. I don't recollect at the time that there was. There may have been some other man that dropped in there during the afternoon, but, if so, I don't recall it.

Q. And how did Mr. Houston appear to be mentally on that day? Will you just tell the Court whether he appeared to be happy and enthusiastic about what was being done to develop these ranches or was going to do?

A. Yes, he did. He appeared to be enthusiastic about the program. It was something that was rather close to his heart, and he was interested in getting it started and getting this program laid out. I didn't see anything different in his attitude that day than would be characteristic of his general attitude.

Q. He seemed wholly congenial?

A. Certainly.

Q. No depression? A. No depression.

Q. No melancholy? A. No.

Q. Didn't look as though he was worried? Did he say anything about—did he look as though he was worried at all? A. No. [556]

(Testimony of Evans M. Taylor.)

Q. Did Mr. Houston comment that he was leaving to go to a party that night, or anything about his appointments for the night?

A. It doesn't ring any bell in my mind, no; I don't recall it.

Q. At the breaking up of that meeting did you leave with an arrangement for a meeting on the following Wednesday with Mr. Hawk?

A. Yes, we did. We had planned to meet Mr. Hawk at the hotel where an appointment had been made and a reservation by Mr. Houston.

Mr. Angell: Take the witness.

Mr. Clausen: No questions.

Mr. Angell: Just a minute. While Mr. Taylor is here and so he will not have to be recalled, I have those letters you asked Mr. Taylor to bring and I am very happy to proffer them to you at this time, Mr. Clausen, if you want to ask Mr. Taylor about them so he won't have to come back. The other things that I have here are just photostats.

Mr. Clausen: I think in view of the letter and the reference to the letter that Mr. Taylor may be properly recalled, Your Honor, with Your Honor's permission.

Mr. Angell: No objection.

Cross-Examination

Mr. Clausen: Q. Mr. Taylor, as I understand it, [557] counsel, Mr. Angell, just stated that you had brought the letters with you that I hold in my hand. Now I will ask you with reference to this one

(Testimony of Evans M. Taylor.)

written in pencil, for example, tell me what that is and where you got that, please.

A. This was a letter that Mr. Houston handed to me.

Q. And was that received from the party here, Vivian Chipman on this reply of November 10th?

A. I would assume that it was, yes.

Q. And refers here to a letter of November 9th, 1953. Is the one in your hand dated November 9, 1953? A. It is, yes.

Q. And when Mr. Houston handed them to you, what did he say?

A. He said that he had this communication and handed it to me and wanted to know whether it called for any reply, and whether he should make a reply.

Q. Yes. And you advised him what?

A. I advised him that, in my opinion, it did call for a reply, an acknowledgment; that it was a matter of concern and consideration with people who had effected the settlement with that party as had been reported to me.

Q. And is that how you came, Mr. Taylor, to have this reply of November 10th which I hand you now and which counsel just handed me as coming from your file or from your office?

A. Yes, that's right.

Q. And did you frame that reply from Mr. Houston? [558]

A. I did. I dictated that reply.

(Testimony of Evans M. Taylor.)

Mr. Clausen: We will offer these in evidence, if the Court please, as Defendant's next in order.

The Court: Let them be admitted and marked.

Mr. Angell: I will ask that they be read into the record.

The Clerk: Defendant's Exhibit K admitted and filed in evidence.

(Letters above referred to admitted in evidence and marked Defendant's Exhibit K.)

Mr. Clausen: Does your Honor wish them read now?

The Court: Yes.

Mr. Clausen: The one in pencil, your Honor, is dated November 9th, 1953. It is 315 something Brigado Drive, Oakland, California, with a telephone number under it, "Lockhaven 9-4579.

"Dear Bill:

"Have tried to contact you by phone several times at your office to no avail. I can't understand why you haven't called. Have you let me down?

"When I came to the Bay area I wanted to get the doctor's name I was supposed to see here, but you are a hard man to contact, and I had to go to a doctor so I went to one near here, and I need the name of the doctor in Lakeview because I need the X-rays. Can't afford to have more made."—"can't [559] afford to have more. I took the money I had and bought a car because it's far out here and I need one. Now I am stuck here at Izzy's house in Oakland without a dime. I am going back to work in about four weeks, but, Bill, I want to

(Testimony of Evans M. Taylor.)

go to Los Angeles and be with my father and daughter, and I don't even have gas money and Izzy is on the road and won't be back for two weeks.

"I can't understand why you are trying to avoid me, Bill. You said you would help me for three months, but that's O.K. if you can help me with enough for just a little while. This is terrible to be stuck here and I don't know a soul here but you and so—and want to get to Los—L.A., as I am going to work in Texas. I have a lot of friends there. See your way clear to call or come by and see me, Bill. You're safe here and no one will see you.

"The least you can do is help me get out of town, even if it's a loan, Bill. I simply don't have anyone to turn to. This is a heck of a mess for me to be in and the least you can do is help me through this month.

"After all, I've been good about this whole thing and I don't think I am asking too much. [560]

Call me, please, Bill. I'll be waiting."

Signed "Pat. Lockhaven 9-5479."

The envelope underneath that is written in the same hand in pencil marked "Mr. William Houston, personal and private, New Zealand Insurance Company, 334 California Street, San Francisco, California."

The answer is on the letterhead of the New Zealand Insurance Company. "November 10, 1953." Di-

(Testimony of Evans M. Taylor.)

rected to Vivian Chipman, 315 Brigado Drive, Oakland, California.

“Dear Madam:

“Mr. Houston received your communication of November 9, 1953, relative to your accident of October 19th, and having to leave on an extended business trip has instructed me to reply and to furnish you the information you requested.

“He regrets that he is not in a position to advance any funds that you may have need of as a result of the injuries sustained in said accident. If there have been any complications as a result of your injuries or a matter of additional medical or doctor bills, it is suggested that these matters be taken up with the insurance company with whom you made settlement. In this respect you should contact Mr. Thomas McNally, assistant claims superintendent of the London Guarantee and Accident [561] Company, Ltd., 360 Pine Street, San Francisco, California, telephone YUkon 2-0688. I am sure that they will do whatever the circumstances indicate to be fair.

“The doctor who treated you in Lakeview is Dr. W. P. Wilbur, 102 North D Street, and he will be in a position to supply you with the X-rays or information in connection therewith.

“Yours very truly,

“Ellen M. Hoffman, secretary to
Mr. Houston.”

With a carbon copy to Mr. McNally of the London Guarantee and Accident Company.

That's all, Mr. Taylor.

Mr. Angell: That is all. Thank you very much.

In reading this letter one of my associates got the impression that in reading, Mr. Clausen, by the inflection of your voice, the writer indicated that she was alone in the town, and that sentence of the letter which that seems to have occurred in was on the last page of the letter. "The least you can do is help me to get out of town even if it's a"—she has it spelled "l-a-on"—it is loan; it isn't a-l-o-ne. The reading of it in the way it was put in there, it sounded even if she had to leave alone by herself, yet the help she wanted was a loan.

May I recall Miss Hoffman before I call the next witness and ask a question in connection with this exhibit?

ELLEN MAY HOFFMAN

recalled as a witness on behalf of Plaintiff; previously sworn.

Redirect Examination

Mr. Angell: Q. I will show you Defendant's Exhibit K and I will ask you if you ever saw the three documents which form that exhibit. For the record, the three documents are the letter from Miss Chipman to Mr. Houston, the reply from Miss Hoffman, and the envelope.

A. Yes, I did, in fact, I stamped it in "November 10th."

(Testimony of Ellen May Hoffman.)

Q. Were you the one who received that letter in Mr. Houston's office? A. Yes, I did.

Q. And when it was received was it marked "Confidential and Personal"?

A. Yes. It says "Personal and Private," yes.

Q. And you opened it?

A. I did. I read it.

Q. You read it. And then what did you do with it?

A. I put it on the stack of mail for Mr. Houston to see.

Q. And thereafter—you have heard Mr. Houston testify that he dictated the reply to it?

A. Yes, he did.

Q. And you wrote it? [563]

A. That is correct.

Q. And you sent it?

A. That is correct.

Q. Did you ever send any further correspondence to Miss Chipman in connection with this accident? A. No, I did not.

Q. Did you ever receive any further communications from her? A. No.

Q. Either by telephone or letter or wire or any communication whatsoever?

A. No, I do not recall that I did.

Mr. Angell: That is all.

Mr. Gustafson.

ROGER GUSTAFSON

called as a witness on behalf of the Plaintiff; sworn.

The Court: Your name, please?

A. Roger Gustafson.

The Court: Spell your last name.

A. G-u-s-t-a-f-s-o-n.

The Court: Where do you reside?

A. Berkeley.

The Court: Your business or occupation?

A. I am in production control.

The Court: Production?

A. Control. [564]

The Court: Where?

A. United Centrifugal Pump.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. You have stated your address for the record, have you?

A. My address is 2921 Florence Street, Berkeley.

Q. You have stated your occupation?

A. Yes, sir.

Q. And you are married to Charlotte Houston, are you not? A. That's right.

Q. The daughter of Mr. William Houston. And when were you married?

A. March 24th of 1951.

Q. And how long had you known the Houston family prior to your marriage?

A. I met the Houston family in the year of

(Testimony of Roger Gustafson.)

1947 at the summer camp—Berkeley summer camp at Tuolumne.

Q. And since that time was your acquaintance with them and visiting in their home continuous up to the time of Mr. Houston's death?

A. Yes, sir.

Q. You attended the usual family activities, did you? A. Yes, sir.

Q. After you became interested in Charlotte?

A. Yes, I did.

Q. Were you both students at the University of California then?

A. I didn't go to the University of California; I went to Armstrong's Business College.

Q. And she went to California, did she not?

A. Yes, sir.

Q. And how frequently would you be in and about the Houston home? When you met them they were living on Shattuck Avenue, were you not?

A. That is right.

Q. And Marin Avenue in Berkeley?

A. That's right. 900 Shattuck Avenue.

Q. How often would you say you were there visiting?

A. Well, it kept increasing. As I got more interested in my wife I went more often.

Q. And you attended family parties?

A. That's right.

Q. And family affairs? A. Right.

Q. Before and after marriage?

A. That's right.

(Testimony of Roger Gustafson.)

Q. And attended social functions?

A. Right.

Q. And did you ever go up to Lakeview in Oregon on vacation? [566]

A. Yes, I went up on vacation for two years during the summer.

Q. And did you ride on weekends often with Mr. Houston? A. Yes, I did.

Q. And that would be out in Walnut Creek, Orinda, around that area? A. Yes.

Q. Mr. Houston had horses, did he not?

A. That's right.

Q. Referring now to the Miller Avenue residence where the Houstons were living at the time of Mr. Houston's death, you were in and about those premises frequently prior to Mr. Houston's death? A. Yes, I was.

Q. And were you familiar with the basement area? A. Yes, I was.

Q. And did you look at Plaintiff's Exhibit 1 here while you have been in the courtroom?

A. No, I haven't seen it until now.

Q. Will you look at it quickly?

A. Do you want me to go down there?

Q. Yes, apprise yourself with the exhibit. Now, do you know whether Mr. Houston kept any of his sporting equipment in that basement?

A. Yes, he did; he kept practically all of it there. [567]

Q. Can you indicate on that exhibit—are you oriented enough to locate on there the area where

(Testimony of Roger Gustafson.)

Mr. Houston kept his sporting equipment as you observed it?

A. Yes, sir. The horse equipment, saddles and fishing gear were in this area here. The guns were over in this corner (indicating).

Q. You are indicating the saddles as being along the west line of the space designated C-4 on Plaintiff's Exhibit 1; is that correct?

A. That's right.

Q. And you are referring to the place where you say Mr. Houston kept his guns as the place marked "Brooms and sweeper" on Plaintiff's Exhibit 1; is that correct?

A. Yes, sir.

Q. And did you ever seen any guns placed in that position there?

A. Yes, sir. I saw them put there by Bill—by Mr. Houston, and I also placed ones there myself.

Q. And will you first describe that passageway, the area in there, at the time those guns were put in there by you?

A. Well, that passageway was very narrow because of all the things that were stored down there in the basement in the way of sleeping bags, bedding, bedboards, chests, and such things as that.

Q. And you say you put guns yourself in there?

A. Yes, sir.

Q. Can you recall any time specifically when you put guns in there?

A. One time that I put the guns in that corner was the first part of November just before Mr.

(Testimony of Roger Gustafson.)

Houston's accident. I helped unload his car when he brought all of his gear back from Oregon, and I personally remember taking the guns from the car, carrying them into the basement and setting them in that corner.

Q. And how were they set in that corner by you at that time? Was there a gun rack there?

A. No, sir, there was not; I set them up against the wall.

Q. With the end of the barrel against the wall and the butt on the floor?

A. Yes, sir.

Q. And how many guns did you take in there at that time?

A. I took three guns in that corner at that time.

Q. And can you describe those guns?

A. Well, there was one long-barrelled gun and two shorter ones.

Q. And do you know what the long barrel was, what kind of a gun it would be?

A. No, sir; I am not enough of a hunter to know the gauge.

Q. Do you know a rifle from a shotgun?

A. Yes, sir.

Q. Was any one of those guns a shotgun? [569]

A. The long-barrelled one was a shotgun.

Q. The long-barrelled one was a shotgun?

A. Right.

Q. Were there other ones there?

A. Yes, sir.

(Testimony of Roger Gustafson.)

Q. How many other ones were there?

A. Two other ones.

Q. Will you describe those as you remember them?

A. One of them had a scope on it and the other one—the other short one just had a plain sight.

Q. I will show you Defendant's Exhibit B in evidence. Did one of them look like that gun?

A. Yes, sir, it did.

Q. Do you know the gauge of that gun?

A. No, sir, I don't.

Q. You are not a hunter? A. No.

Q. Did you know the gauge of the other gun?

A. No, sir.

Q. Was the other gun about this height?

A. Yes, sir.

Q. Could you positively identify this as the gun that you put in there?

A. No, sir, I cannot.

Q. I think you may resume the stand now. Did Mr. Houston [570] frequently go into the basement as you saw him? A. Yes, sir.

Q. And did you ever go in there when he went in to see what he was doing?

A. Yes, sir, I have been down there with him.

Q. What did you see him doing on any of those occasions?

A. Well, he would go down and maybe just work on his saddle or fishing rod—sort of a hobby place for him down there.

(Testimony of Roger Gustafson.)

Q. Did you ever see him down there in his bathrobe and slippers? A. Yes, sir.

Q. Pajamas? A. Yes, sir.

Q. You didn't see him on February 22nd, did you? A. No, sir.

Q. Would you say that happened frequently when you were around there or was it an unusual incident to have it happen?

A. Well, it was frequent.

Q. Did the time of day vary as to when you might see him in there? Did you see him there at any time of the day?

A. There was no set time.

Q. You had some of your own things stored in that basement area, did you not?

A. Yes, sir.

Q. Where was that? [571]

A. In the storage room adjacent to the furnace room.

Q. Is that the area shown on Plaintiff's Exhibit 1 on the board as G-2?

A. That's right.

Q. Called "Storage"? A. Yes, sir.

Q. About how big a room was that?

A. Well, it was about four by four, I would say.

Q. And did you have quite a bit of material in there?

A. Yes, sir; we had all our wedding presents that we were storing in there.

Q. Would you say that room was pretty full?

(Testimony of Roger Gustafson.)

A. Yes, it was. I never saw a gun in that storage room.

Q. You never saw a gun in that storage room?

A. No, sir.

Q. During the years that you knew Mr. Houston from 1947 up to the date of his death on February 22, 1954, had you ever been on social affairs or in the home when Mr. Houston was taking any alcoholic drinks? A. Yes, sir.

Q. And did you observe his drinking?

A. Yes.

Q. And could you very briefly and quickly summarize how you would describe the drinking of Mr. Houston and the number of drinks? [572]

A. Well, at times—there would be times when he wouldn't take any at all; for instance, when he would come to my house for dinner, we wouldn't have any because I couldn't afford it; so at those times he wouldn't have any at all. Other times I would see him take I will say no more than three.

Q. Have you ever, in the years you have known Mr. Houston and been in his home and attended social functions, ever seen Mr. Houston drunk?

A. No, sir, I have not.

Q. Have you ever seen him with so many drinks aboard that he was incoherent or was not able to walk straight?

A. Definitely not.

Q. Have you ever been with him when he had drunk so much alcoholic beverage he could not talk coherently? A. No, sir, never.

(Testimony of Roger Gustafson.)

Q. Or show any signs of the influence of alcohol? A. Never.

Q. Or drive? A. Never.

Q. Now, did you at any time observe any gun shells or rifle shells of any kind about the Houston residence there on Miller Street?

A. Yes, sir. I did.

Q. Just point out on that Plaintiff's Exhibit 1 if you saw any in that area that is shown there where you would see them. [573]

A. There were some back in this bookcase in the corner and there was also a cardboard carton along there with his saddles and fishing gear and with those things in it.

Q. Were the shells in that box?

A. There were some there, yes, and there were also some back in the corner in the bookcase.

Q. Did you ever seen them elsewhere in the house? A. Yes.

Q. Where else would you see them?

A. In his bureau drawer upstairs in his bedroom.

Q. In other words, it was the habit of Mr. Houston to have shells around the house any place; is that right? A. Yes, sir.

Mr. Angell: I think that is all.

Cross-Examination

Mr. Clausen: Q. While you are there, Mr. Gustafson, will you point again to the wall there

(Testimony of Roger Gustafson.)

where the saddles were heaped and where you found that box of shells?

A. It was right along in this area. (Indicating.)

Q. May I take a crayon and mark with the crayon an "X" on it?

A. In this general area. The saddles were hung on the rack right here.

Mr. Clausen: All right. I will just mark that G—we already have a G there. What is your first name? A. Roger. [574]

Mr. Clausen: I will mark that R-1. That was a box of shells, you say?

A. Yes, sir.

Q. The kind of shells that would fit what kind of a rifle?

A. There were shotgun shells and rifle shells; I cannot tell you the gauge.

Q. In other words, an assortment of shells in that box?

A. Yes, sir, there were.

Mr. Clausen: That is all.

The Court: We will take a recess.

(Recess.)

Mr. Angell: May the record show that I have asked Mr. Roger Gustafson to return to the stand for just one question.

ROGER GUSTAFSON

recalled as a witness on behalf of the Plaintiff; previously sworn.

(Testimony of Roger Gustafson.)

Redirect Examination

Mr. Angell: Q. You stated in your direct testimony that you had helped Mr. Houston unload the guns sometime in—or unload his car sometime in November, 1953, and that you had taken three guns back and placed them in what is shown on Plaintiff's Exhibit 1 as the "Brooms and sweeper" location.

Do you recall whether you ever saw those guns still there at any time after that?

A. Yes. The last time I can recall that is somewhere around [575] the middle of January.

Q. You recall seeing them there?

A. Yes.

Q. In the middle of January?

A. Yes, sir.

Q. Were you in the basement after the middle of January, do you know?

A. Yes, I was.

Q. Do you recall whether they were there or not?

A. No, sir, I do not, after that time.

Q. Was that because you didn't observe or that they were not there?

A. Because I did not observe.

Q. They may have been there and you not see them?

A. That's right.

Q. The last recollection you have of actually looking and seeing was somewhere in the middle of January?

A. Right.

Mr. Angell: That is all.

Mr. Clausen: No questions.

(Witness excused.)

GILBERT WILKES

called as a witness on behalf of the Plaintiff; sworn.

The Court: What is your full name, please?

A. Gilbert Wilkes. [576]

The Court: What is your business or occupation?

A. Secretary - treasurer, Mutual Stevedoring Company.

The Court: Secretary and treasurer. And where do you live?

A. In Happy Valley, Lafayette.

The Court: Take the witness.

Direct Examination

Mr. Angell: Q. Well, you have a tendency in speaking to speak so that it is hard to hear you out here. Would you direct your voice as though you were speaking to me, well out, and then counsel can hear? A. I will try.

Q. And the reporter can hear.

A. I will try.

Q. It will make it easier for all of us, and I won't have to repeat my question.

Mr. Wilkes, did you know Mr. Houston in his lifetime? A. I certainly did.

Q. And how long had you known him?

A. I would say, well, since about 1945 or in there.

(Testimony of Gilbert Wilkes.)

Q. And when did you first become acquainted with him and in what capacity?

A. I met him through, as I recall, Frank Avery. He used to be the Fire Association manager for this area. He brought Mr. Houston up to the Kiwanis Club. That was my first meeting.

Q. Was Mr Houston a member of the Kiwanis Club? A. Yes, sir, he was.

Q. You said your business was the stevedoring business, did you not?

A. That's correct.

Q. How long have you been in that business?

A. Since 1927.

Q. Is that your own business?

A. I have a partner.

Q. And you operate that business. What is the nature of a stevedoring company business? What do you do?

A. We load and discharge ships for sea—and deliver cargo off the piers and handle railroad cars, discharging them.

The Court: Where?

A. In Francisco, Oakland and the bay area.

Mr. Angell: Q. You say that you first met Mr. Houston at a Kiwanis Club doing, is that right?

A. That's correct, meeting.

Q. How often between that time and the time you became associated with Mr. Houston in business did you see Mr. Houston? Would you see him frequently?

A. When he was in town he always attended

(Testimony of Gilbert Wilkes.)

the meetings, which is on Tuesday night at the Fairmont Hotel. I would see him at least that day and possibly another day.

Q. Did you ever visit Mr. Houston's home?

A. No, sir.

Q. Did he ever visit in your home?

A. Many times.

Q. With Mrs. Houston?

A. Mrs. Houston, yes.

Q. And you are married and have a family, have you not? A. That's correct.

Q. Of what does your family consist?

A. I have a married daughter, married son and a younger son.

Q. Did you ever become associated with Mr. Houston in business?

A. Yes, we entered into an enterprise—let's see—I am not sure whether it was in 1951 or in there somewhere—the Southern Oregon Ranches, we called it. Later on we formed another corporation to handle cattle, which was called the T-Bone Ranches.

Q. Who was associated with you first in the Southern Oregon Ranches?

A. Mr. Harry Utley and—original stockholders were Mr. Harry Utley, Dr. Christensen, Mr. Houston and myself.

Q. And in the T-Bone Ranch?

A. That was Mr. Taylor, Mr. Houston and myself.

Q. And were you about all equal owners in

(Testimony of Gilbert Wilkes.)

your interests in there or did someone have a greater interest?

A. Stock interest, yes.

Q. They were all—both corporations, is that right? A. That's correct. [579]

Q. Now, who managed those corporations, if anyone?

A. Well, Bill—I mean Mr. Houston was the manager—I mean, as far as I was concerned. I depended entirely on him for the handling of the affairs of the ranches.

Q. Would you describe him perhaps as the general manager? Would you?

A. Well, yes; he was the president of both.

Q. And then you had a man up on the ranches who took care of them?

A. That's right. Mr. Hock. He was a neighbor of the Southern Oregon Ranches and he did most of the plowing or planting, and later on he looked after the cattle that we had on the T-bone Ranch.

Q. The few years that you were engaged in that, would you say that you had been fairly successful financially?

A. Well, we had no complaint.

Q. Were you planning on expanding those operations at the time of Mr. Houston's death?

A. That was the original intent, was to enlarge the land area so it would run more cattle.

Q. Did you hold meetings just shortly prior to Mr. Houston's death to discuss that expansion?

A. That's correct. On Sunday that was——

(Testimony of Gilbert Wilkes.)

Mr. Angell: That is all.

Mr. Clausen: No questions.

(Witness excused.)

Mr. Angell: Plaintiff rests the case in chief.

Mr. Clausen: Your Honor, my witnesses are not present at the present time. I ask an adjournment now till the next day of court. I will have them here.

The Court: Take care of the adjournment until ten o'clock Monday morning.

(Thereupon an adjournment was taken to 10:00 o'clock A.M., Monday, November 14th, 1955.)

The Clerk: Houston vs. Canada Life, further trial.

Mr. Clausen: Ready, your Honor.

Mr. Angell: If your Honor please, at the close of testimony on Thursday I rested my case in chief. I am asking permission of the Court at this time to recall Mrs. Houston to reopen on chief, just for one short question. I looked over my record over the weekend and I note I failed in asking one question.

The Court: Very well.

CHARLOTTE H. HOUSTON

recalled as a witness in her own behalf; previously sworn.

Redirect Examination

Mr. Angell: Q. Mrs. Clayton, my recollection of your testimony is that you awakened Mr. Hous-

(Testimony of Charlotte H. Houston.)

ton on the after noon of February 22nd and then went down and got a glass of tomato juice and put it on the stairs, left it there for Mr. Houston to drink, is that correct? A. That's correct.

Q. And then he later drank it and then came downstairs and through the kitchen and into the basement, is that correct? A. That's correct.

Q. Now, referring to the time when you awakened Mr. Houston on that afternoon of February 22nd. Will you state, as year as [584] you can recall, about how long in time it was from the time that you awakened Mr. Houston until Mr. Houston came through the kitchen and went down into the basement when you heard the thud or noise?

A. I should say between five and ten minutes.

Q. And that's to the best of your recollection?

A. To the best of my recollection.

Mr. Angell: That is all.

Mr. Clausen: No questions.

(Witness excused.)

Mr. Angell: That's the Plaintiff's case.

KENNETH C. PINE

recalled as a witness on behalf of the Defendant; previously sworn.

Direct Examination

Mr. Clausen: Q. Officer Pine, you have been sworn and testified preliminarily in this case last week before we had the police department's notes here. I now have received from Lieutenant Sherry what has been marked Defendant's Exhibit F and which

(Testimony of Kenneth C. Pine.)

included at that time photographs, which are in this envelope which now have been introduced in evidence as "J" it looks like—in this group that I hold in my hand——. Would you hold the photographs, please, just temporarily—they are the usual police department records, and I believe you will find in there a statement, which I now show you and ask you if [585] that is your signature, Officer Pine. A. Yes, it is.

Q. K. C. Pine. Would you hold those in your hand, please? And would you tell me when that statement was made, in point of time after your observations and investigation of this shooting on February 22, 1954?

A. The report was signed by me at approximately 4:25 P.M.

Q. About when? A. 4:25 P.M.——

Q. That's—— A. ——of the same day.

Q. Of the same day as the shooting?

The Court: What date?

A. The 22nd of February.

The Court: All right.

Mr. Clausen: Q. 1954? A. 1954.

Q. 1954, is that correct? A. Yes.

Q. Just answer "Yes" or "No." Did you say "Yes"? A. Yes.

Q. Now would you explain, whether that was done in the usual procedure, for records of your Berkeley Police Department?

A. Yes, it was done in the usual procedure.

Q. From your examination of those records,

(Testimony of Kenneth C. Pine.)

that you hold in [586] your hand, are they kept in the ordinary course of business of the Berkeley Police Department? A. Yes, they are.

Q. And, by the way, Office Pine, how long have you been with the Berkeley Police Department?

A. Thirteen and a half years.

Q. And during the thirteen and a half years have you had occasion to investigate shootings, suicides? A. Yes, I have.

Q. On the specific occasion here, February 22, 1954, you tell me, from referring to your records there now, just about when it was that you arrived at the scene of the shooting.

A. I arrived there approximately 2:15 p.m.

Q. Were you accompanied by anyone else, Officer Pine? A. No, I went alone.

Q. And when you arrived did you view the body and the scene of the accident? A. Yes, I did.

Q. Did you observe the conditions as would appear on the external surfaces of the body, the wounds of the body, as shown by the photographs here——. Have you seen these photographs? .

A. Yes, I have.

Mr. Clausen: May I open them up, please.

Q. Would you look through those photographs, please, and tell me, is that the photograph of what you saw on that occasion? [587]

A. Yes, they are the same photographs.

Q. I have in my hand three photographs which show the body, and there are in my hand four photographs which show the gun.

(Testimony of Kenneth C. Pine.)

You have marked on the board—rather, on the diagram on the board—the two points; one is marked P-1, where you saw the body, and I will ask you whether these three photographs indicate the approximate position of the body as you have indicated upon the diagram.

A. Yes, that's approximate.

Mr. Clausen: Your Honor, I think——. Well, it is obvious from the pictures they are of the body. I was going to ask that they be marked separately. In any event——

The Court: Do you offer them?

Mr. Clausen: They are in evidence, your Honor.

The Court: Very well.

Mr. Clausen: They were introduced as a group. I merely called attention to the fact that these three just now identified by the witness perhaps should be marked separately.

The Court: That is what I have in mind.

Mr. Clausen: All right, your Honor. They are marked J. May they be marked J-1, 2 and 3?

The Court: You will have to consult the Clerk on that.

The Clerk: Defendant's Exhibit J-1, J-2 and J-3.

(Exhibit J further identified as Exhibits J-1, J-2 and J-3.) [588]

Mr. Clausen: Q. Officer Pine, I show you the remaining four photographs, which apparently show a gun, and I will ask you, do they show the

(Testimony of Kenneth C. Pine.)

gun at this point that you have indicated on the diagram P-2?

A. I can't be too sure of the position of the gun in the picture as marked on the diagram.

Q. As far as you recollect, is that correct, though?

A. As far as I recollect, the pictures were taken before the gun was moved.

Q. Yes. So if those are the police photos, they would be the photos taken of the gun before it was moved from the spot where you saw it when you arrived, is that correct?

A. As I recall, yes.

Q. Is that correct?

A. That is as I recall it.

Mr. Clausen: Then may these be marked, your Honor, in the following sequence?

The Court: They may be admitted and marked.

The Clerk: Defendant's Exhibit J-4, 5 and 6 and 7.

(Photographs further identified and marked.)

Mr. Clausen: Q. Officer Pine, when you arrived at the scene—you can refer to your notes if you need—you have the permission of the Court—when you arrived at the scene of the shooting, did you receive information from some persons there? [589]

A. Yes. I talked to Mrs. Houston.

Q. Would you refer to your notes there, Officer Pine, and tell me if you received information from any other person?

A. Yes. There were Mrs. Houston's daughter Ann, and her mother, Mrs. Spaulding.

(Testimony of Kenneth C. Pine.)

Q. What, if anything, was told you by Mrs. Houston as to a possible motive in this case?

A. She——. Mrs. Houston?

Q. You can refer to your notes if you wish, Officer Pine for the exact words.

A. Mrs. Houston told me that her husband had been under pressure, had been working hard getting some reports out for the year, and that at times he was depressed. However, over the week-end he had been in good spirit.

Q. Now, referring to your notes there, Officer Pine, did you receive any information from any member of the family as to where guns were stored in the house? A. Ann Houston; Miss Houston.

Q. The daughter? A. The daughter.

Q. She stated what to you?

A. She showed me a closet underneath the stairway in the basement section.

Q. Yes.

A. Where guns were stored; where she said guns had been [590] stored over a period of time.

Q. All right. As a result of your observing at the scene and from your observations of the body, from your discussions with the parties there, did you rule out the possibility of murder?

A. Yes, I did.

Q. What did you conclude in respect of the method by which this man was shot, referring to your notes, Officer Pine?

Mr. Angell: May I—just before the witness answers, may I make my objection?

(Testimony of Kenneth C. Pine.)

The Court: You may.

Mr. Angell: To which we object on the grounds as incompetent, immaterial, irrelevant, not within any issue in this case, calls for opinion or so-called expert testimony without having established the qualification that this man is an expert, and, further, on the further ground that the question whether a death is due to accident or suicide, under all the cases, your Honor, is not subject to opinion or expert testimony. That is what your Honor has to decide or a jury, if it were before a jury. So even though this officer would testify that he came to the conclusion that it was one or the other, that would not be proper evidence to admit in this case, and, in fact, it would be improper and prejudicial.

The Court: Submitted?

Mr. Clausen: Yes, your Honor. [591]

The Court: The objection will be sustained.

Mr. Clausen: Now, I adhere, of course, to your Honor's ruling, but I had in mind——

The Court: You may reframe your question, whatever you have in mind.

Mr. Clausen: All right, your Honor.

Q. From your observations of the scene of the shooting and of the body and based on your experience in similar cases Officer Pine, did you reach a conclusion which you have set forth in your report there as to the method of shooting?

Mr. Angell: Same objection.

The Court: Same ruling.

Mr. Clausen: I had in mind, if the Court please,

(Testimony of Kenneth C. Pine.)

the Court let in evidence the other day, the testimony——

The Court: Refer to these notes here that he made. You may develop what he has.

Mr. Clausen: All right.

Q. Did you set forth on the notes that you have there, Officer Pine, the statement as to your conclusion of the shooting?

A. Yes, I did, on this report.

Q. All right. May I take the notes?

A. (Witness producing.)

Mr. Clausen: I offer in evidence, if the Court please, the notes signed by Officer Pine dated February 22, 1954, and [592] from which he has testified and which he has identified.

Mr. Angell: May I make my objection?

The Court: You may.

Mr. Angell: The same objection, your Honor, as to everything on this exhibit which has to do with the opinion of the officer as to the cause of death, whether it was accident or suicide. I believe the cases are clear that the statements or report made by the officer, if made at the time, would be admissible.

May I ask a couple of questions of the officer before this is admitted?

The Court: You may.

Mr. Angell: Q. Officer Pine, did you make this report at the time you were at the scene of the Houston home on February 22nd or afterwards?

A. It was afterwards.

(Testimony of Kenneth C. Pine.)

The Court: I thought it was the same day, was it?

A. The same day, approximately an hour and a half, and maybe two hours afterwards.

Mr. Angell: Q. About an hour and a half later. And will you look at your notes that you made at the time you were at the Houston residence?

A. My notes are in evidence here somewhere else.

The Court: Hand him them.

Mr. Angell: It would be Exhibit A. [593]

(Exhibit handed to the witness.)

Mr. Angell: Q. Now, referring to those notes, Officer Pine, will you tell me whether there is anything said in those notes as to any conversation with Ann Houston or Mrs. Houston?

A. There is one notation where Miss Houston said her father came downstairs about two. Otherwise, no, no written notes of any conversation.

Q. So that in this report that you made on the 22nd after you got back to the police station, that what you have made in there regarding conversations is your best recollection made at that time as to what was said when you were up there, is that correct? A. Yes.

Q. Now, are you an expert in firearms and guns? A. No, I am not.

Q. Have you had any experience with firearms or guns at all? A. Yes, some.

Q. What? A. In my police work.

(Testimony of Kenneth C. Pine.)

Q. Well, what would you say where that experience was?

A. Oh, yearly target practice, pistol and rifle, shotgun course.

Q. Just firing guns in your police target practice, is that correct? A. Yes. [594]

Q. But as to the mechanism of guns and types and calibers of guns, are you an expert in that field at all? A. No, sir.

Q. As I understand this report, Officer Pine, this was a report written up by you of what you saw and at the place up there at the Houston residence at 1082 Miller, February 22nd, after you had gotten back to the police station and made up a report, is that right? A. Yes.

Q. And you took down no verbatim notes as to any conversation, did you, Officer?

A. No, I didn't.

Q. Are you a hunter? A. No, I'm not.

Mr. Angell: Now, I will renew the objection, your Honor, upon the further ground it is not shown that the officer is qualified to make the observation that appears in this report. I do not know whether your Honor has seen this report. It might——

The Court: Pass it up.

(The court examining.)

The Court: The last paragraph I should say legally is objectionable, hearsay, calls for the opinion and conclusion.

Mr. Angell: That is exactly the part. The rest

(Testimony of Kenneth C. Pine.)

of the report I have no objection to. They are [595] notes made in the usual course. The opinion evidence there or statement purported to be evidence is inadmissible, your Honor, under all the authorities.

The Court: Do you object to this in its entirety?

Mr. Angell: I offer my objection to it in its entirety, first on the ground that it was not made at the time that he was up there but was made an hour and a half later in the police station, and only purports to be his recollection of what occurred there. So I will object to that on that ground.

I object specifically to his statement regarding the cause of death other than by gunshot wound, upon the ground that it is not subject to expert testimony.

The Court: I will allow it to go in evidence, with the exception of the cause of death and the opinion and conclusion of this witness.

Does that appear to clear up your situation?

Mr. Clausen: Which number will that be, Mr. Clerk?

The Clerk: Defendant's Exhibit L.

(The report of Officer Pine, limited by direction of Court, received in evidence and marked Defendant's Exhibit L.)

Mr. Clausen: You may take the witness.

Cross Examination

Mr. Angell: Q. Officer Pine, when you went to the Houston residence there on February 22nd,

(Testimony of Kenneth C. Pine.)

you went back into the corner, did you not, where the body was found—not where the body [596] was found; where the gun was found?

A. Yes, I did.

Q. And will you just for the record describe the physical appearance of that as you went in there, Officer Pine?

A. From the main section of the basement where you could stand erect, I had to duck under some clothes that were hung on the line, then step up onto a raised platform and walk with head bent down under these floor joists—in fact, to the corner, and it was a narrow passageway; there was furniture, articles—other articles stored in there, and I believe there was some camping gear and just odds and ends of household articles stored in this section, and there was a very narrow passageway through to a small opening at the corner.

Q. Did you have to stoop going in there, Officer Pine, as you went in, it was so low?

A. Yes. And after I got up onto the raised portion I had to stay stooped all the time.

Q. Was there laundry hanging in the basement?

A. Yes, there was.

Q. Now, did you have considerable difficulty in getting through this passageway where all that furniture was?

A. Well, considerable difficulty — actually—. The gun was lying on the floor there; I had to step over that as well.

Q. Was there an end table there?

(Testimony of Kenneth C. Pine.)

A. Well, there were articles of furniture, [597] which I don't know exactly.

Q. Will you step over to the exhibit and show now and point where you are referring to these articles of furniture?

A. This area; within here (indicating). It seemed to be more than just what shows on the board or on the diagram.

Q. To clear that up for you, Officer Pine, this drawing was made on November 2, 1955, and the man who made it only put the objects here that were there when he drew it and was told that those were there at the time. It does not show all of the things that were there when you were there. That is what I am trying to say.

A. No. There was, as I recall, a bit of open space right at here, in the corner (indicating).

Then there was some articles here that—that was just a very narrow passageway through here.

Q. Very narrow? A. At this point.

Q. Was there an end table in there?

A. I don't recall the pieces that were there.

Q. Now, referring, Officer Pine, to Plaintiff's Exhibit No. 1 in evidence. You have placed the body in this diagram in your previous testimony as being P-1, right alongside the ironer. Mrs. Houston—Clayton, rather, in her testimony and Mrs. Ann Hanscom, the daughter, placed the body over by the washing machine. Can you state from your recollection now [598] whether the body would be near the location you placed it at P-1, besides the

(Testimony of Kenneth C. Pine.)

ironer, or over by the washing machine where it has been placed by Mrs. Clayton and by Mrs. Ann Hanscom?

A. From the diagram I made at the scene, the body was closer to that position.

Mr. Clausen: Indicating P-1.

A. Of mine, P-1. From my recollection and the diagram I made at the scene, standing in the basement there.

Mr. Angell: Q. So you place it at about where you placed it, at P-1, is that correct?

A. Possibly a few feet further, but not as far as over here.

Q. You would not place it as far out as Mrs. Clayton and Mrs. Hanscom have? A. No.

Q. But you might place it a little further that way than you have placed it, is that correct?

A. It wouldn't be more than a foot or two further.

Q. I will show you Defendant's Exhibit J-2 and ask you if that would assist you any in referring where the body was.

A. Apparently from this picture and the diagram, these two posts or uprights would be approximately at the center—these I assume to be the uprights in the diagram, showing in the picture.

Mr. Clausen: Pardon—you were answering one question. Counsel is now giving you another. You were referring to this [599] and——

Mr. Angell: They are the same pictures that you put in, Mr. Clausen.

(Testimony of Kenneth C. Pine.)

Mr. Clausen: The point is, the reporter yet hasn't got the full answer.

A. There are these marks on the diagram indicating these uprights, the posts. The body would be moved forward probably another foot, another three, four, five feet, because in the picture it shows the posts to be about even with the knees.

Mr. Angell: Q. I will hand you all three of Defendant's Exhibits J-1, 2 and 3 and ask you: From looking at those photographs you can tell approximately where the body was; and, if it is not where you located it at P-1, would you then draw with a different colored chalk the place where you now place it after seeing those photographs?

A. If there is any change at all, it would be approximately a little bit further north and a little bit further to the east.

Q. The east is this way, here?

A. (Witness indicating.)

Q. Now will you mark that P-4?

A. (Witness designating P-4.)

Mr. Angell: Thank you. No further questions.

Redirect Examination

Mr. Clausen: Q. Officer Pine, when you spoke that day after you arrived with Mrs. Houston, the then Mrs. Houston, did [600] she appear composed to you? A. Yes.

Mr. Clausen: That is all.

Mr. Angell: No further questions.

(Witness excused.)

(Testimony of Kenneth C. Pine.)

ironer, or over by the washing machine where it has been placed by Mrs. Clayton and by Mrs. Ann Hanscom?

A. From the diagram I made at the scene, the body was closer to that position.

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A. (Witness designating P-4.)

Mr. Angell: Thank you. No further questions.

Redirect Examination

Mr. Clausen: Q. Officer Pine, when you spoke that day after you arrived with Mrs. Houston, the then Mrs. Houston, did [600] she appear composed to you? A. Yes.

Mr. Clausen: That is all.

Mr. Angell: No further questions.

(Witness excused.)

EDWIN F. PARKER

recalled as a witness on behalf of the Defendant; previously sworn.

Direct Examination

Mr. Clausen: Q. Inspector Parker, you testified for us last week in this case before we had the records of the Berkeley Police Department which were produced by Lieutenant Sherry.

I now have in my hand the photographs and the police report. I will hand you, first, the series of papers, the bundle of papers which constitute the report, and I will ask you whether in there there are reports by yourself. A. (Witness examining.)

Q. Now, here, I notice a card. Is that a report by yourself in the file? A. Yes, it is.

Q. All right. May I take that first, please.

By the way, is that your signature on the reverse side of that card? A. Yes, it is.

Q. And those records were kept in the [601] ordinary course of business, were they, ordinary course of practice of the Berkeley Police Department? A. Yes.

Q. Now referring to that card, can you tell me, did you have a talk with anyone representing the family following the trip that you made to the scene of the shooting? A. Yes, I did.

Q. And on what day?

A. By telephone on the 3rd of March, 1954, and in person on the following day, the 4th of March.

Q. And who was that?

(Testimony of Edwin F. Parker.)

A. That was the attorney Angell who is present here.

Q. And then on the same day did you make a report yourself of what you had seen and observed and had been informed at the scene of the accident?

A. No. The report I made of what I had observed at the scene of the accident was dictated on the morning of February 23rd, the day following my visit to the scene of the shooting.

Q. Is that what you are now referring to?

A. Yes.

Q. So that this report was made the morning following the shooting?

A. Yes; I dictated it, concluded the dictation at 9:50 A.M. on the following morning.

Q. And does that report set forth your observations, what [602] you were informed, the result of your investigation? A. Yes, it does.

Q. Let me ask you, Inspector Parker, what was your assignment at the time that you made this observation on February 22, 1954?

A. Well, my assignment included various assignments, the principal ones being investigation of all homicides and felony assaults, except for robberies.

Q. And when you made the investigation on this occasion was there one officer in charge—I mean, you went there, as I understand it, Officer Pine was there; who was in charge of the investigation?

A. Officer Pine in this particular case, because it was not my duty to take over the investigation

(Testimony of Edwin F. Parker.)

unless there was indication that a crime was involved.

The Court: We will take a recess.

(Short recess taken.)

Mr. Clausen: Q. Inspector Parker, how long had you been with the Berkeley Police Department at the time of the shooting in this case, last year?

A. Over twenty-four years at that time.

Q. And during that period did you investigate homicides, including suicides? A. Yes, I did.

Q. And especially suicide by gunshot wounds?

A. All types of death which were not natural and certified [603] by physicians.

Q. And when you got to the scene of the accident, scene of the shooting, on this occasion, can you tell me who already, if anyone, was already there?

A. Officer Chandler, Officer Pine—I recall.

Q. You may refer to your notes, if you wish. Did you accompany anyone else to the scene?

A. I don't recall anyone with me.

Q. Your notes are there, the first document.

A. (Witness examining.) Oh, yes, Officer Wilen, one of the police photographers, left the station with me. I took him to the scene.

Q. When he arrived did he take these pictures which have been introduced in evidence and which I now show you? A. Yes, he did.

Q. And while you were there—you may refer to your notes. While you were there did the Coroner or a deputy coroner arrive?

(Testimony of Edwin F. Parker.)

A. Yes, deputy coroner Osborne.

Q. And what did he do that you saw?

A. In my presence the body was turned over so that we could observe the entrance wound of the bullet and he also unloaded the rifle involved in my presence and the presence of Officer Pine—I am quite sure was there.

Q. When you say “he” you refer to whom?

A. Mr. Osborne. [604]

Q. What was found in the rifle?

A. One discharged shell, cartridge, in the chamber.

Q. Were there any cartridges in the magazine?

A. No, it was empty.

Q. And I believe you already testified last week to the blast and the appearance of the wounds, so I won’t ask you again.

Did you, Inspector Parker, testify in any Coroner’s inquest? A. I did not.

Q. May I have that statement that you have signed there?

We will offer in evidence, if the Court please, the signed statement by Inspector Parker.

Mr. Angell: May we make our objection to that, your Honor?

The Court: You may.

Mr. Angell: Same objection as to the statement made by Officer Pine, objected to on the grounds of incompetent, irrelevant, immaterial, not within any issue in this case; it is hearsay, shows from the testimony he didn’t make the report until the next

(Testimony of Edwin F. Parker.)

day; upon the further ground as to the opinion testimony of Inspector Parker as to whether it was an accident or suicide; the same objection as that is urged, the same objection as to the conclusion of Officer Pine, it is not a subject of expert testimony, that it is for this Court or a jury, if it were before a jury, to determine, and accordingly it is inadmissible, it would be error to admit it.

The Court: What are the contents of it?

(Examined by the Court.)

The Court: At this time I will sustain an objection to this document. You may develop the facts therein enumerated.

Mr. Clausen: Your Honor, I think they have been fairly well developed between the examination today and also of last week.

The Court: Just so that you may know what I have in mind, there are opinions and conclusions in this document which are legally objectionable.

Mr. Clausen: Well——

The Court: The other recital there is evidence in the record in every detail.

Mr. Clausen: That is what I had——. All right, your Honor.

You may take the witness.

Cross Examination

Mr. Angell: Q. Inspector Parker, after referring to your notes, did you have a conference or a discussion regarding this matter, subsequent to February 22, 1954, with respect to the records?

(Testimony of Edwin F. Parker.)

A. Yes, I——

The Court: Pass the notes up here, Mr. Clerk.

Mr. Angell: That's the report—I am referring to the inspector's notes.

A. I don't have my original notes, but I do have a supplemental report in the file that was written on the 4th of March.

Mr. Angell: Q. Yes. And you had, as I understand it, before you wrote that note or prior——. When with respect to your meeting was that report written? A. Yes.

Q. When was it? Was it a report of the meeting?

A. On the 4th of March, 1954, I discussed the case with acting chief Fording and Lieutenant Sherry, superintendent of records.

Q. Go ahead. And is that report—is that a report made of that meeting?

A. Yes, this is a report made of that meeting.

Q. What I am asking is—what I want to ask is: Was the report handled in this case—was this case handled as a usual case of this type, insofar as the records of the Berkeley Police Department were concerned?

A. No, it wasn't because we have had no specific general order covering this particular type of condition and it was agreed at the meeting that all of the investigative data we had accumulated would be made available by showing (not by turning reports over) to representatives of either the family or the insurance carriers involved. [607]

(Testimony of Edwin F. Parker.)

Q. Now, at that time had the Coroner's inquest been called? A. No, it had not.

Q. And who requested the Coroner's inquest, if you know?

A. I did, in a conversation with the Coroner of Alameda County.

Mr. Angell: That is all.

Mr. Clausen: That is all. Thank you, Inspector Parker.

(Witness excused.)

Mr. Clausen: Call Mr. Bungarz.

BERNARD D. BUNGARZ

called as a witness on behalf of the defendant; sworn.

The Court: Your full name, please?

A. Bernard D. Bungarz.

The Court: Where do you reside?

A. 2633 Sixteenth Street, Oakland.

The Court: Your business or occupation?

A. Retired.

The Court: How long have you been retired?

A. Since January of this year.

The Court: Prior to that time what business, if any, were you engaged in?

A. Coroner of Alameda County.

The Court: During what period of time?

A. I was Coroner for two years.

The Court: For two years. Take the witness.

(Testimony of Bernard D. Bungarz.)

Direct Examination

Mr. Clausen: Q. For the two years, Mr. Bungarz, were you in the Coroner's office?

A. I was.

Q. That's the Coroner's office of Alameda County. And what positions did you occupy—what position did you occupy immediately before this two-year period when you were the actual Coroner?

A. I was the chief deputy coroner for eight years.

Q. Chief deputy eight years. All in all you had been in the Coroner's office how long as of the first of this year?

A. Thirty years.

Q. Thirty years. All right. Do you recall, do you, the case that we are trying, the case of William Houston? Do you recall that case?

A. Yes, I do.

Q. As of February, 1954, and would you tell me if it was a fact that in the usual course the body was brought in to the Coroner's facility? Is that correct?

A. That is right.

Q. And are there various alternatives open under the law for—rather, were there for you to make a conclusion in the matter of how the death was caused?

A. There was, yes.

Q. And explain those alternatives, Mr. Bungarz. [609]

A. I might by investigation give a cause of death.

Q. I beg your pardon?

(Testimony of Bernard D. Bungarz.)

A. I might by investigation give a cause of death.

Q. In other words, by your own investigation?

A. By my own investigation, and I might do it by calling a Coroner's jury.

Q. All right. Now, in this particular case, what was your original intention?

A. My original——

Mr. Angell: Objected to, your Honor, incompetent, irrelevant and immaterial.

Mr. Clausen: Your Honor——

Mr. Angell: He asked what he intended to do. The evidence is here that there was a jury inquest, a jury called, and the verdict is in evidence.

Mr. Clausen: I understand that and I am, your Honor, entitled, as I feel, to produce evidence in response to that.

The Court: There are two methods under the law to hear these matters?

Mr. Clausen: Beg your pardon?

The Court: There are two methods, are there?

Mr. Clausen: Yes, your Honor.

The Court: I will allow the question.

Mr. Clausen: All right.

Q. Your original intention was what, Mr. Bungarz, as Coroner? [610]

A. My original intention was to do it by investigation only.

Q. And had you proceeded in that, to use that method up to a certain point? A. I did.

(Testimony of Bernard D. Bungarz.)

Q. And had you reached a conclusion yourself as to the cause of death? . A. I did.

Q. What was that?

Mr. Angell: Just a minute. I object, your Honor, on the grounds incompetent, irrelevant and immaterial, that it is hearsay to this plaintiff in this case, that it is calling for opinion testimony or expert testimony, which is not subject to expert testimony, as I understand the question asked this witness, if he determined whether this was accidental or suicide.

The Court: Submitted?

Mr. Angell: Yes, your Honor.

The Court: Objection sustained.

Mr. Clausen: Q. In the course of your activities as Coroner for two years, as chief deputy for eight years, and as an employee of the Coroner's office for some full thirty years, during that period of time did you investigate or reach conclusions as to causes of death, of suicides? A. I did.

Q. And suicides by gunshot wounds?

A. I did. [611]

Q. And could you tell me the approximate number or could you tell me just about how many perhaps per year—give me some idea as to the number of cases of that kind in which you reached conclusions as to the cause of death.

A. That would be a hard question to answer. There are—they were numerous, but as to number, that would be a hard question to answer.

Q. All right. In this case you already testified

(Testimony of Bernard D. Bungarz.)

that you had proceeded by the investigation method of your own office and had reached a conclusion as to the cause of death. Now, what, if anything, intercepted—what, if anything, intercepted that official action that you were about to take?

Mr. Angell: Just a minute. Your Honor, I object to that as incompetent, irrelevant and immaterial, not within any issue in this case; it is not a proper subject to be introduced in evidence in this case. The fact is officially that this witness called a Coroner's jury, and eventually reached a verdict. If this witness came to a different conclusion, it doesn't carry any more weight in this court than perhaps the verdict of the jury carries, and certainly it is not admissible in this court. It is attempting to prove by alleged expert testimony whether a cause of death was suicide or accidental, and the cases are absolutely without a break that that cannot be done. It is inadmissible.

The Court: Submitted? [612]

Mr. Clausen: Submit it, your Honor.

The Court: Objection sustained.

Mr. Clausen: I don't want to intrude on your Honor's ruling, but I would ask this question, your Honor:

Q. Isn't it a fact that a person from the office of Mr. Angell asked you not to reach your conclusion and requested a jury inquest?

Mr. Angell: Objected to as incompetent, irrelevant and immaterial and is not within any issue in this case. What difference would it make if it

(Testimony of Bernard D. Bungarz.)

were true? I will say it isn't true. But what difference would it make? The official inquest was held.

Mr. Clausen: The difference is, if the Court please, that if counsel himself puts in evidence, as he has here, a jury's verdict or a verdict of a Coroner's jury, rather, which in effect says "undetermined," then I am entitled, your Honor, to disclose the full facts surrounding that verdict. I have here the man officially who had charge of the particular matter, of this particular inquest.

Mr. Angell: Your Honor——

Mr. Clausen: I intend to show, your Honor,—or, rather, to ask the witness further facts concerning this interpretation of his own act—in other words, the act for Mr. Angell's office who asked that the Coroner not list his own conclusion down of suicide but rather—— [613]

Mr. Angell: I object to that statement as being——

Mr. Clausen: ——but, rather, to proceed by Coroner's inquest.

Mr. Angell: I object to that as a statement of counsel. There is no evidence to that effect.

Mr. Clausen: I say I offer to prove.

Mr. Angell: There is no evidence to that effect in the record.

Mr. Clausen: I understand. I say I offer to prove that.

The Court: Well, if it is challenged. You say

(Testimony of Bernard D. Bungarz.)

it isn't. I will allow it. The objection will be overruled.

Mr. Clausen: Q. Now, did you have a call from someone purporting to be from Mr. Angell's office concerning your method of procedure in this case?

A. I did.

Q. And when was that, Mr. Bungarz?

A. I have no idea of the date, only that it was after the 22nd of February.

Q. All right. And was it before the inquest that was held in this case?

A. Yes, it was.

Q. And who did this party say he or she was?

A. Mr. Angell.

Q. And what request was made of you?

A. The request was that I hold an inquest because Mr. Angell [614] thought that he had some testimony that might change my ideas on it.

Q. And did you tell Mr. Angell that you had reached a conclusion yourself at that time?

A. I did.

Mr. Angell: Objected to as incompetent, irrelevant and immaterial. Now he is trying to——

The Court: The objection will be sustained. That may go out.

Mr. Clausen: All right.

Q. And did you tell Mr. Angell the reasons why you had reached the conclusion you had reached?

A. I did.

(Testimony of Bernard D. Bungarz.)

Mr. Angell: Same objection. Ask that it go out.

The Court: Same ruling. It may go out.

Mr. Clausen: Q. Was there any testimony given at the inquest which in any manner changed your original impression?

Mr. Angell: Same objection.

The Court: The objection will be sustained. It may go out.

Mr. Clausen: You may take the witness.

Mr. Angell: No questions.

Pardon me. Just one question.

Cross Examination

Mr. Angell: Q. Have you any notes, Mr. Bungarz, which [615] show the date of your conversation with me?

A. I have not.

Mr. Angell: No further questions.

(Witness excused.)

Mr. Clausen: Your Honor, the defendant rests.

Mr. Angell: If your Honor please, the plaintiff is ready to rest except for one piece of testimony, and that is as to the date that Mr. Bungarz says I called him. I am positive that his recollection of the date is wrong, but it will be in my office records and I would like to look at them and make sure of my memory and my recollection is that the first time I head of this case was on the 24th of February, that I was then on my way to Caspar, Wyoming, on legal business, that I did not return

until March 2nd. That is just my recollection. My calendar will show it. I want the record to show it. Just that one date.

Could we then go over to two o'clock and I will check the record? Outside of that, your Honor, plaintiff will be ready to rest.

Does your Honor wish this presented on arguments or on briefs?

The Court: Well, that it a matter for you gentlemen. I do not indicate in any fashion what you may or may not do.

Mr. Angell: We will discuss it and proceed accordingly.

The Court: Adjourned to two o'clock. [616]

(Thereupon an adjournment was taken until 2:00 o'clock p.m.) [616-A]

Mr. Angell: If your Honor please, prior to the noon recess I stated I wanted to look at my office records as to when I had talked to Mr. Bungarz, the last witness on the stand. I misunderstood Mr. Bungarz' testimony. I had the reporter read it to me afterwards, and Mr. Bungarz' testimony was that he spoke to me between the 22nd of February and the inquest. I thought he had said he had spoken to me on the 22nd. In view of that, I have no further testimony and no further rebuttal, and we rest.

Does your Honor wish oral argument?

The Court: Whatever you gentlemen desire.

Mr. Clausen: Does your Honor wish that——

Mr. Angell: Shall I proceed with the argument?

Mr. Clausen: Do you wish to proceed with the oral argument?

Mr. Angell: Yes, if——

Mr. Clausen: All right, then.

Mr. Angell: If the Court wishes to hear it.

The Court: Proceed.

Mr. Clausen: I will proceed.

Mr. Angell: Well, I will proceed. Anyway, I believe I have the right.

The Court: Proceed.

CLOSING ARGUMENT

Mr. Angell: If your Honor please, this is a relatively simple case so far as the issues are concerned. The issues as framed by the pleadings are that Mr. Houston in September filed his application of insurance with the defendant here, that the policy subsequently was issued, that the premiums were paid, and Mr. Houston met his death on February 22, 1954.

The defendant pleads two affirmative defenses. Those defenses are that there was a falsification of the application when Mr. Houston affirmatively stated in the application that he did not use alcoholic beverages, but socially and only occasionally and answering the further question as to whether he used alcoholic beverages to excess, his answer was that he did not. Calling your Honor's attention to the provisions of the application, the exact wording, the exact wording is, your Honor, question 6-A: "To what extent do you use alcoholic stimulants?" Then there is a place up at the top that says, "Answer." The answer is "Yes." And then "Socially only occasionally." And then there is a second part

to that question, 6-B: "Have you ever used them to excess?" The answer is, "No."

These are affirmative defenses, your Honor, and therefore they must be proved by a preponderance of evidence. The burden is on him who asserts those defenses.

The other defense is as to whether Mr. Houston died by his own hand or by accident, and the same rule of law applies. The burden of proof in both affirmative defenses is on the defendant by clear and satisfactory evidence.

As to the provisions in the insurance policy, your Honor, I don't think I could better put it than was put by the courts of this state in *Everett v. Standard Accident Insurance Company*, 45 Cal. App. 332, at 338, where the court said:

"The special defenses raised by appellant were all based upon the alleged fraud of decedent. The presumption is always against fraud. This presumption approximates in strength that of innocence of crime."

Citing the old, old case, your Honor, of *Truett v. Onderdonk*, 120 Cal., with which your Honor is certainly familiar.

"One who seeks relief from fraud must allege it and prove it by clear and satisfactory evidence. A mere suspicion of fraud is not sufficient. Here the evidence was conflicting in every particular. Consideration will be given to each of these"—and so on.

That is the rule of law as far as the application for insurance is concerned.

The same is held in *Moore v. Giffen*, 110 Cal. App. —I do not have the page citation here.

As to suicide, your Honor,——

The Court: Counsel has it.

Mr. Angell: I beg your pardon?

The Court: Counsel has that citation.

(Colloquy between counsel and associate.)

Mr. Angell: I will repeat for the record, *Moore v. Giffen*, 110 Cal. App. 659.

Beers v. California State Life Insurance Company; 87 Cal. App. 440, at 456:

“It must be borne in mind that the defendant entered the trial charged with the burden of overthrowing the presumption that the deceased was sane and that her death was not suicidal but from a natural cause. It rested upon the defendant to overcome said presumption, or, in other words, to support the affirmative defense of suicide, ‘by preponderance of clear and satisfactory evidence, direct or circumstantial’.”

Then citing 37 *Corpus Juris*, Section 443, page 640, and cases cited in the footnotes and “Also the above named cases.”

“And whether the defendant introduced sufficient satisfactory proof to overcome that presumption or to sustain the defense was a question to be solved by the jury.”

And then they went on and stated they would not set aside the jury verdict.

Another case stating the rule is *Wilkinson v. Standard Accident Insurance Company*, 180 Cal.

252, at 256, 29 American Jurisprudence, 1144, insurance, Section 1520.

Now, taking up, your Honor, the first and what appeared to be the most serious of the objections urged to paying this policy in this case, I will take up the question of intoxication or a fraud committed on the insurance company when the application was signed by Mr. Houston and he stated that he did use intoxicants, yes, socially and occasionally or only occasionally.

The first thing I would like to do is to review the testimony produced by the defense in support of that. They produced the deposition of Virginia Wilkerson. Mrs. Wilkerson was the daughter of Mr. Harry Utley that your Honor heard on the witness stand and who had been Mr. Houston's hunting company for some ten or twelve years, as well as his business companion. She had grown up with Mr. Houston when he was up in Oregon and which, incidentally, was a relatively short time each year, taking the whole year, and she testified then in response to a question she had seen Mr. Houston under the influence of liquor.

As to Jean Pierson's testimony, she was the waitress in Van's Restaurant or Cafe. She had never met Mr. Houston until just prior to the time when she testified, and she said she first met him, she thought, in October, and she had seen him two or three times and that when she saw him in the restaurant that he appeared to be intoxicated or to have been drinking. I call your Honor's attention to the fact that the application for this insurance was

signed on September 18, 1953. Jean Pearson's deposition, she stated she saw him in October 1953, which would be after the date of this application, hence under no stretch of the imagination could that be evidence upon which to find fraud committed, something done after the date of the application.

As against that flimsy evidence covering a relatively short time, and sporadic visits of Mr. Houston up to southern Oregon, we produced for your Honor the family of Mr. Houston, with whom he constantly lived. We produced his business associates, first in the insurance field, where he was an active man and where he took part in the insurance conferences and meetings of the insurance world. We produced his business associates in southern Oregon ventures, the T-Bone Ranch and the Southern Oregon Ranch. We produced his hunting companion, Mr. Harry Utley, who through all the years said he had hunted and fished with Mr. Houston as a close personal friend, in his home, with his wife, with his family, his daughter and his son, and each of them testified that they had never in their life seen Mr. Houston under the influence of alcohol, intoxicated, or so that his speech was heavy or mixed up or incoherent, that he had ever in any manner whatsoever shown any excessive use of alcohol.

As against the testimony produced here and against the presumption that a man does not admit fraud, we submit, your Honor, that there is no evidence that such drinking as they have proved isn't

right square within the definition as Mr. Houston answered those questions in that application.

The cases are clear that the questions in an application for insurance being worded by the carrier, they are most strongly construed against them. Now, if the insurance carrier here had thought those questions to be of such materiality to the issuance of that policy, they could very easily have asked on the signing of the application: How many drinks do you take a day? How many do you take a week? How many do you take a year? And not ask questions which are entirely subject to the interpretation of the man answering those questions. What one man might call "social and occasional drinking," another person might think was "heavy drinking." What one person might say was not excessive, another would say was excessive. So much depends on the man himself. To one not used to alcohol I suppose that one drink might make him intoxicated. I suppose that to a person who did not drink occasionally, that he might think if he took a drink once a week that that would be excessive.

Frankly, I have looked in the cases, I have looked in the books, I find no legal definition of any of those words. They are pretty much words of definition or judgment of the person answering the question.

Now, the agent for the insurance company was Mr. Robert Utley of the Canada Life. Mr. Robert Utley witnessed the statements given in there by Mr. Houston, and all I can say here is, your Honor, he was raised with Mr. Houston, he grew up with

him, he was inducing Mr. Houston to take out that policy. Now, surely Mr. Robert Utley didn't encourage Mr. Houston, an insurance man himself, to put anything that would be misrepresentation in the insurance policy. It would seem utterly incomprehensible. On the contrary, they are both insurance men; they both knew each other very, very well; they knew each other's habits, and apparently the agent thought that would be a correct designation of whatever use of alcohol he had seen so far as Mr. Houston was concerned.

Now we will pass to the question of the manner in which Mr. Houston met his death. The evidence here is without dispute, so far as actual evidence of the manner in which Mr. Houston met his death is concerned. That briefly summarized, is as follows: The members of Mr. Houston's family, his assistant manager, Mr. Masters, his secretary, Miss Hoffman, the attorneys for the New Zealand Insurance Company, his business associates, Mr. Wilkes and Mr. Taylor, and Mr. Masters, his hunting companion, Don Campbell, who was just like a son to Mr. Houston, Mr. Utley, all testified without any hesitance that Mr. Houston was of a naturally cheerful disposition, that he did his work easily, was very efficient in both his work and his sports, that he was not a nervous man, that they had never seen him in a depressed or melancholic mood, and as far as known to them, he did not evidence any depressive or melancholic nature. As to every witness, Mr. Houston was shown as a vigorous, energetic man who enjoyed a well rounded life; at home, free of

domestic difficulties; in business, standing high in the estimate of his employers and his associates; and in the insurance fraternity, successful in business; as a member of the Kiwanis Club and the insurance fraternities, he was highly respected and held in high esteem. It would be hard to show a clearer picture of a man well adjusted to life and loving life than the picture shown here of Mr. Houston.

On Friday, before Mr. Houston met his death, he put in a full day at the office, was congenial and happy, gave no evidence whatsoever of any thought of death. He made plans, which were shown on his calendar by his secretary, activities for the coming week. He said, no, he wouldn't stay to dictate a letter to the home office on a suggestion for the budget and for business activities for the coming year of 1954, that he would leave it until Tuesday when he came back. You will recall, your Honor, Miss Hoffman said that she would stay and they could get the letter into the mail. They had to meet a certain boat going over or a plane; that he said, "No, we can do it on Tuesday."

On the Saturday preceding his death he attended a function given for his daughter at her sorority. And on the following day, Sunday, he went to church, as usual, with his family and spent the afternoon with Mr. Wilkes and Mr. Taylor making plans for furthering their profitable farming and cattle venture in southern Oregon.

Certainly up to that time, your Honor, there wasn't the slightest evidence of any thought in this

man's mind that he was going to die, either accidentally or by his own hand. Mr. Taylor and Mr. Wilkes both testified that their cattle venture had been profitable, that they were planning on expanding, that they spent from 1:30 when they arrived out at Mr. Wilkes' home in Upper Happy Valley, and laid plans for going ahead with that; that they had the superintendent of that ranch coming down to meet them on Wednesday; that Mr. Houston gave no sign of any depression, of any melancholy or anything other than as he always was, and that is a happy, energetic business man, enjoying every bit of what he was doing.

Then that evening he had to hurry back from that meeting to a dinner with the Hanscoms. Mr. Hanscom took the stand here and testified that he attended that meeting. Other members of the family testified what occurred there. It was just a friendly evening. Ann Houston, the younger daughter of Mr. Houston, was engaged to Mr. and Mrs. Hanscom's son Ronnie, and that they were having a regular family get-together that evening. That the evening was spent in having a dinner, that they talked afterwards and just carried on in the usual conversation. Mr. Houston in no way evidenced any depression, any different attitude, manner or speech or action than he did at any other time.

Then what followed after? They left the Hanscoms and went home, and, according to Mrs. Clayton, they retired at around 11:30. Mrs. Houston testified that Mr. Houston slept until late in the afternoon, until she called. She said that was usual and

customary in the family, that they on holidays and weekends often did that.

She testified that she and Ann got up about 9:00 or 9:30, that they had their breakfast, and they had done things around the house; the daughter was putting up a little bookcase in the hallway to put some what-nots or books on, and Mrs. Houston was out getting ready for lunch.

By that time she went upstairs, Mr. Houston was asleep. She awakened him and asked him if he wished to come down for breakfast. He said he did. She asked him if he would like to have her bring up the tomato juice. He said he would, and she went down and got the tomato juice and put it on the stairway up by the bathroom because by that time Mr. Houston had gone into the bathroom to wash up.

He had come out and he drank the tomato juice and then came down the stairs in his bathrobe and in his slippers, and pajamas and without his glasses.

That as he came down Ann was there putting up that bookshelf, and she was singing, "Oh, What a Beautiful Morning," and Mr. Houston's comment was, "It surely is."

And then Ann said to her father, "We're going to have steak for breakfast." He said, "That is fine," or "Sounds good," or words to that effect, and he walked on down the stairway through the kitchen, down the stairway, and the next time they heard anything was the thud or a shot.

Now, according to Mrs. Houston, from the time she awakened Mr. Houston to the time he was found

in the basement was not over ten minutes. That was important, your Honor, important in my view because the fact that a man awakened out of a sound sleep, in ten minutes go into a bathroom and wash, drink his orange juice, go down, is this consistent with the idea that he was bent on self-destruction? It seems absolutely incredible, impossible.

Now, that is what the actual occurrence was. Mrs. Houston ran down to the basement and she found Mr. Houston there, shot, and she called to Ann to call the ambulance.

Now, Mrs. Houston places the body and Ann Houston placed the body where it is shown here, where, according to the scale, would be about 22 feet from the place where the shot was fired. Officer Pine places the body closer to the ironer over there, and that would be somewhere in the neighborhood of 15 to 18 feet. The fact remains, nevertheless, that Mr. Houston did go into that corner. The evidence is that that is where guns were kept; Mr. Gustafson said he put guns in there; that is where they were kept and all members of the family testified that in that corner guns were consistently kept by Mr. Houston. The testimony is not that he kept all his guns in there, but guns were constantly kept in here (indicating), from time to time, and Mr. Gustafson said he placed three guns in that corner at the close of the sporting season or fishing season in November of 1953 when Mr. Houston came down from the hunting season up there; he was returning his sporting things from the ranch for the winter. He said

he saw those guns in there as late as January 15th, I think—he said somewhere in there, 1954.

All of the witnesses that were familiar with Mr. Houston's habits testified that he kept guns all over, that he kept guns loaded from time to time, that he kept shells all over; that while he was careful with firearms, he said that people with loaded guns were careful, which is just the standard of a man who feels that a gun is a lethal weapon and therefore the best way to keep people away from them is to load them and tell them so.

The evidence is that the area in which those guns were kept was a lower area, which required Mr. Houston to lean over. The evidence is that that corner where those guns were kept was all cluttered up, and the officer—everyone who saw the area, said that the area had bedboards and fishing rods and all miscellaneous things sticking out into an eighteen-inch pathway. Well, eighteen inches, your Honor, is pretty small. I'm nearly that broad across.

There is no question, the only thing undisputed in this case is that Mr. Houston met his death by a gunshot wound, a gunshot which was fired in the location designated in Plaintiff's Exhibit 1 where Officer Pine placed his figure there, as shown, and where the hole—where the board was cut out. The evidence is without dispute in this case, your Honor, that that gun, rifle could be discharged and was discharged by dropping it with the firing pin, the hammer closed, and the firing pin on the shell, which is the position it is laying there now. Both Mr. Kirk and Mr. Bradford testified that they had dropped

the gun and caused it to go off accidentally, without pulling the trigger, they dropped it and had it fire.

Under this state of the evidence, your Honor, and with there being no evidence whatsoever to show self-destruction, there is no evidence, not a scintilla of evidence, to show self-destruction, except that the body was found in the basement and the conjecture as to how Mr. Houston could have gotten over that gun, in the position he did, when it went off. Well, I suppose every one of us, your Honor, has many, many times said, referring to finding someone dead, "We wonder how that thing could have occurred." I can't tell your Honor how Mr. Houston was shot. I say it is unequivocal here that neither has the defendant in this case told us how he was shot. There is speculation, conjecture, innuendo, inference, that he could have leaned over that gun and fired the shot. We do not deny that. It is equally true, and the evidence is equally as strong, that he could have slipped and fallen and hit that gun and in catching it and dragging it to him, he could have been in that position. He was already stooped over. If he had reached and taken the gun this way and swung around with his leg or clothing, the gun could come in touch with anything so as for him to have gone over onto that gun so that it fired in the position it did. It would have been the simplest thing in the world. There is nothing magical, there is nothing unusual, it is not an impossible situation. On the contrary, I think it could be reenacted a dozen and one times.

Mr. Houston was a tall man. He was already over that gun at the time when he was moving it. But there are a dozen other factors which enter into it which would show that he did not. In the first place, Mr. Houston was a sportsman and he knew guns. The evidence was that he had a revolver upstairs in his closet or in his dresser. Why would a man go down to shoot himself in a position which might not be fatal at all and take a chance? With all these other things before your Honor, no motive, no reason, no family trouble, no business trouble, a man with a financial and sound position, a man planning for the future, a man with a daughter to be married, a man respected and loved in his community, a church man—there was nothing about Mr. Houston that even indicated a man who would take his own life. Not one of the people who lived with that man for years said they had even heard him suggest such a thing. Those things, do they not count when the time comes to weigh the scale of justice, more than by simply saying, "We found a man in a certain position and he was shot and therefore we will say he killed himself." By what rules do we live this game of life, that when we come to mete out on the scale of justice we can not call upon our history and our practice, the things that we have done in time gone by, our attitude to our family, our friends and our business? In the things that we do then, that is how we should be judged, not only on the scales of justice, but on every other measurement.

The most flimsy defense I have ever seen in any

case, your Honor, is the defense of suicide in this case, a hasty conclusion drawn without looking into the background of this family, without looking into the reasons which Mr. Houston might have. You couldn't even find a struggle to find that behind his pains and aches there was something in his health, that he might have been told he had cancer or something which would have caused a man to do a thing like this. There was not one shred of evidence. On the contrary, the evidence is that this man was out working, that he was anything but in bad health, he was not in a bad financial condition, he was in an excellent financial condition. Struggle as they might, try as they might, dig as far down as they could, they dragged out one thing: an automobile accident, and they tried to tar this man with the name of a woman of ill repute, and it blew up like a firecracker.

Now, I say, your Honor, how are we entitled, Mrs. Houston, entitled to have this death of Mr. Houston interpreted under fair and just construction of the law? I think it is just the way the cases say, that if by any possibility this man could have come to his death by accident, then these defendants can not sustain their defense. They must show beyond any shadow of a doubt that this could not have been an accident.

Well, your Honor, I'm a little short. I'm only five feet six, and it would be no problem for me at all to lean over and fall on this gun in such a manner as to shoot myself in the angle in which that is. I could slip, I could have a greasy barrel of this

gun and have it dropping out of my hands, and go down and get it, and I could have reached around here, and this, which all the witnesses said was a loose action, and it might, when it pulled out or had been put in an open action, Mr. Houston, being a sportsman, could have seen it open, not having his glasses on, say, "I better not go out in all that clutter with that gun open like that; it exposes the trigger: it may go off," and then in a foolish, idle moment, he may have leaned over to close this, and not having his glasses on, it would have been an easy matter for him to discharge that gun. I could stand here, your Honor, — he could have just dropped that gun like this, and being stooped over already, he could have followed it over in the position he was.

I have known so many cases, your Honor, of accident where I knew they were accidents, which if anyone tried to reconstruct that accident, it would have been utterly impossible because things just don't happen in that way.

The burden is not on us to show that was not suicide. The burden is on them to show it was. And the undisputed evidence in this case, your Honor, is that it could have happened accidentally. The verdict in the coroner's jury is not binding on this Court, but it is evidence that the coroner's jury heard the witnesses in this case that were called before it. They concluded they couldn't determine. I will say to your Honor right now that if I didn't have the background that I have produced here for this Court, a background that I think your Honor

will agree we have put in without any hold-back whatsoever, even to the point of tediousness, we have gone in and produced for cross examination the very inner life, the inner sanctum of Mr. Houston's doings——. Did we find anything on cross examination at all? They were here, and if there was anything, if he was a drunk, if he was a man to commit suicide, why wasn't it brought out from those who would be the most likely to bring it out and say so? They were under oath. Now, there was no cross examination of those witnesses, and well and good reason there wasn't: simply because they were not the type of witnesses that would get on that witness stand and say to your Honor (if it were not the truth), number one, Mr. Houston did not drink to excess; I never saw him intoxicated; and in their opinion he was in good spirits, there was nothing to show any intent or desire to leave this world, and if he had any they would have told your Honor so because they were that kind of people. Two of them were close associates, three of them, and they are members of this bar, officers of this court, and they under their oaths and also under their oaths as officers of this court have told your Honor that they have never heard the slightest suggestion that Mr. Houston—the slightest suggestion of Mr. Houston doing away with himself. Now, I have summed up here very briefly what I deemed to be the high spots of the testimony here and over which the defendant in this case can not get, and that is the whole pattern, the fabric of what has been produced here, one from which only

one conclusion can be drawn, and that is that it was not intentional.

I will enumerate them quickly for the record. Mr. Houston slept late that morning, as was always his custom to do. He took time to put on his bathrobe and his slippers, to go in and wash, to drink tomato juice. Would a man within ten minutes of the time of his death, if he were going down to shoot himself, to go in and bother to wash, bother to put on a bathrobe, bother to put on his slippers, bother to drink tomato juice? I submit he would not.

Could he go down those stairs past his daughter and his wife, where the testimony shows that they would close to him, they were a part and the fabric of him; he lived for them; he was a church man with them; he went to their sorority things; he went to the social things; he was not a man who didn't love his family; but could he have walked down past them within one and one-half minutes of the time of his death and not have shown in his demeanor, have shown in some way that what he intended to do? They both said he showed no differently, he was happy, that she, Ann, was singing, "Oh, What A Beautiful Morning," and he said, "It surely is," and then "We're going to have steak for breakfast," and he says, "It sounds fine." Does that sound like a man going down to kill himself within a minute and a half? I submit that no man is made of such steel and fabric that he could do such a thing. He would give evidence of it in every single act. I say he couldn't do it. He would find some other way. He would have taken a revolver and

gone away from his family. He would not have gone down into that corner and fired a bullet which in going up might have killed one of the members of his family. That alone to me would be a circumstance which would say to me: "A man wouldn't do that, a man who knew guns." He knew that if a bullet of that caliber was fired in that fashion it would go right through him and kill anyone else it hit, and he would expose his family above him.

Every single thing pointed to the fact that Mr. Houston did not contemplate self-destruction. He left his glasses off. If a man were going down expecting to get a gun and load it and to pull the trigger and everything, do you think he would leave his glasses behind, when the testimony is that he always used his glasses and had to have them to see well?

There is another thing that I think is very significant in this, your Honor. Your Honor will remember that Officer Pine was on the stand. He said that he had seen this bag of shells in which, he testified, had some shotgun shells, had some shells in there, rifle caliber. And later when Mr. Bradford and Mr. Kirk testified, he testified there were three different calibers of shells in that bag. I asked Officer Pine when he picked up that bag of shells was it open or closed, and Officer Pine said it was closed. Now, let's assume that a man had gone down there and he took a shell out of that bag and he was going to put it in there to commit suicide, all of which, according to the testimony, undisputed testimony, he never had time to do. Would he have

rolled that bag back up again and closed it after he took a shell out of it? I would say no. He would just take the thing out and lay it down, certainly. And certainly he had to in the time that elapsed in this particular instance.

Now, there is another bit of evidence here, your Honor, and that is the distance from where Mr. Houston was shot to where his body was found. I do not care whether it is where Officer Pine put him or whether it is where Mrs. Houston and Ann put him. The fact of the matter is that Mr. Houston was shot clear over in this corner and did what any man would do who was accidentally wounded, and not what a suicide would do. After being shot, he struggled all the way from here, clear over to where his body was, a distance, if you take this, of about 15 to 18 feet, and if you take where Mrs. Houston and Ann put him, it would be 22 feet, and here he was trying to reach help. If a man were going to commit suicide, do you think for one minute that he would shoot himself and then try to reach help? He would shoot himself and quit right then and there. That would be the normal thing for a man to do in that condition. Mr. Houston at the time he went over there and fell was trying to get out to get help, and that's why he was headed right square for that door. He was almost to it. And I submit, your Honor, that is likewise one of the tell-tale things in this case.

Accordingly, your Honor, in this case I respectfully say that the defendant has failed to produce any substantial evidence for either one of the sepa-

rate defenses. The only evidence that the defendant has produced as to intoxication is that on an occasion, a time, testimony of one of the witnesses there before the signing of that application, had seen him under the influence of liquor. Just what that "under the influence" was, I don't know. I submit an "occasion" would not defeat that policy, even if that had been before. There is no evidence that Mr. Houston drank other than as a social and only occasional drinker.

Now, he did not use alcohol to excess.

As to the evidence of any suicide in here, your Honor, the only possible evidence of any suicide would be remote, speculation, conjecture and innuendo and inference; that because the bullet went through Mr. Houston when he was in a horizontal position and that therefore he could reach the trigger—I can reach it—that therefore he had to have committed suicide. I submit, your Honor, that that is not adequate proof to meet the test of law, it is not adequate proof to overcome the presumptions and it is not adequate proof to entitle the defendants to escape liability on the policy in this case.

ARGUMENT ON BEHALF OF DEFENDANTS

Mr. Clausen: If it please the Court, counsel asked for the right to open and close. As a matter of fact, as I recall, he said he had the right to open and close. I assume from that that he voluntarily assumed for himself the laboring oar because it would be less than fair if I had the full burden

of proving the defenses for counsel to open and close. It is perhaps unimportant in a practical sense because from the physical facts in this case no matter who opens or who closes, the facts remain the same, and it is our position, your Honor, that at least on one of the defenses that the physical facts alone demonstrate beyond any doubt, your Honor, that the shooting here in this case was deliberate.

Now, there are two issues, suicide and misrepresentation. I shall discuss first the suicide feature because in my opinion, your Honor, the physical facts are so decisive on that particular point I think, your Honor, that if we fairly face the facts and the realities of the facts we must come to this conclusion, either the man shot himself, somebody else shot him or something else shot him. But, your Honor, the theory that somebody else shot him or the theory that something else shot him is dispelled by the physical facts.

There is no argument on the physical facts. Either he did shoot himself or he didn't shoot himself, but, your Honor, there are no facts, no real facts in the case, that somebody else shot the man or that something else shot the man.

Now, if he did shoot himself, as we say in this case is the conclusion, your Honor, to be drawn, why then everything that has been proved in this courtroom before your Honor falls into place, the testimony of the police officers, the testimony of the position of the body, the fact that the gun was kept in the corner or the ammunition was kept in the corner, everything falls into place.

But if the opposite theory is taken, that somebody else shot him, like a murder, or something else shot him, well then, your Honor, it flies in the face of what the physical facts are and we are in the realm of speculation, we are in the realm of wandering in the realm of supposition, and I say, your Honor, to assume anything other than the man shot himself defies the laws of probability.

Now, if he did not shoot himself, then it was made to appear that he did shoot himself because of the physical facts. And then I would say to your Honor: By whom or by what? Now, as counsel tried to demonstrate here, he just couldn't demonstrate.

Now, we know that these things happened, your Honor, these are the facts that happened, and these are the undisputed facts. And when I speak of facts, I say, your Honor, let's face the realities of the facts that have been proved. Here's the man. He either sleeps or he stays in bed on this 22nd of February, 1954, last year, until about 1:30 or 2 o'clock. His wife says that she told him she was going to make breakfast. All right, he is up and he comes downstairs at a time when she expects him, your Honor, to sit down and eat breakfast. He comes in, says nothing to her, he is dressed in his bathrobe and dressed in his pajamas, wearing slippers, goes through the kitchen, passes his daughter in the hallway, and significantly, your Honor, says not one word to the wife, says not one word to the daughter about his going downstairs.

Now, I say to your Honor, if he had any reason

at all to go downstairs other than to do away with himself, would he, your Honor, not have stated something to his wife or daughter? In other words, if his purpose in going downstairs was not to shoot himself, then surely he would have said to his wife, some passing comment: "Well, I'll be right back, I'm going downstairs to do this or something else," or he would have said something of the kind to his daughter.

Now, your Honor knows and I know from experience that people who intend to kill themselves, they don't say anything about it to anybody but they go and do the act. Now, here's a man who passes through the kitchen at the time his wife is preparing for him a meal, passes his daughter, and says not one word about his going downstairs. Neither one even knew that he went downstairs, and then, your Honor, within two minutes, according to the testimony, the shot is heard, giving him time to go downstairs and do exactly what he had in mind doing. And your Honor knows and I know too that people who intend to do away with themselves are acting, your Honor, on the impulse to kill themselves. It isn't for me to try and reveal the workings of the mind of the man. It isn't incumbent upon me, your Honor, to prove the motive of the man.

I have my own proof, that is in the record, the proof from the police officers at a time when Mrs. Houston had not had an opportunity to reflect, at a time when the truth was spontaneous, at a time, your Honor, when she had not consulted counsel,

and at a time when the police officers are there and are trying to find out why the man did it. She tells them then honestly that he had been depressed, that he had been nervous and depressed.

Well, what do the physical facts show, your Honor? The physical facts show that the shooting happened in the middle of a passageway, at a place, your Honor, where the floor board was taken up, with the gun, your Honor, resting in this place, "K-1".

I call this to your Honor's attention, as was demonstrated before. Mr. Houston was a tall man, and in order, your Honor, for him to bend over and do what he wanted to do this day, he not only had to bend over parallel, but, your Honor, he bent over so that the gun is here; but to make sure, your Honor, he puts the muzzle up to his heart.

Now, here is a man who is accustomed to handling firearms, who, according to all the testimony, is careful with firearms. But, your Honor, this thing rests and the depression in the wood shows it is the same as the recoil of the other two places, there is no evidence here of any jamming of the gun down or fall of the gun. Rather, it is exactly the opposite. The recoil makes the depression. Your Honor will remember I asked Dr. Kirk. And so the shoulder pad fits there, and here's an experienced hunter, a man careful with guns, and he knows just how to kill himself. And, your Honor, he is a man who goes around and he is accustomed to killing things, and so I say to your Honor if that kind of a man wanted to do away with himself, he would pick a

good sure way. He didn't give his wife a chance to stop him, he didn't talk to his wife in the kitchen and say, "I'm going downstairs to get a gun," for any reason. He didn't talk to his daughter. No. He went down and in a clear passageway, the gun is on the floor, and this is the significant thing, your Honor, the muzzle is put against his chest, and so it comes out here in the back. In other words, he bends over, your Honor, like the doll, demonstrating with the mannikin) so that, your Honor, the gun muzzle points to the heart—points to the heart, and, your Honor, comes out lower in the back than it enters in the front, which, your Honor, shows—shows, if the Court please, that he was not only bending over deliberately and had put the muzzle of the gun to his heart deliberately, but, your Honor, where he rests it on the ground, bends over like this, and his hand is right here to fire that trigger, as I can, your Honor, so easily.

Now, your Honor, those are the only facts. There, the gun is found. The photograph shows the gun is right there in the center of the passageway.

And after that is done, if the Court please, then the police arrive. There is right at that place, your Honor, blood, and there is a trail of blood from there over to the place where his body is lying with his hands underneath him, just like in that case of Long against the Insurance Company, 43 Cal. 2nd, and he is lying there, your Honor, and the police arrive. The wife says to the police, "He had been nervous or depressed lately."

Now, I say to your Honor, those are the known

physical facts, and with those known physical facts, your Honor, there just can't be entry in a court of law into that realm of speculation.

Now, your Honor could say, your Honor could speculate that somebody ran in there, grabbed him and shot him in that fashion. But, your Honor, as Dr. Kirk and the other witnesses showed, if you drew a string, if you drew a string from that spot in the floor up through the man's body, it would go right overhead about perpendicular. Now, you couldn't possibly, your Honor, even taking their most remote theories—if a man is holding a gun in his hand and he stumbles and he falls, it (the gun) couldn't possibly fall in the position in which they said, or if it did fall, there would be the impression, which isn't there. Rather, it is just as Dr. Kirk said, it is an impression of a recoil, and there are two other recoils alongside.

So not only, your Honor, is he bending over, not only is that gun deliberately, deliberately pointing to his heart, but, your Honor, it comes out lower in the *fact*.

And then, your Honor, to clinch the case, we have the powder burns which are at the entry point, and there at the entry point the wound is of course this large ugly wound that was identified by the police officers as showing that these gases from the explosive shell that was in the gun had burnt and seared the wound around the man's heart, showing that the muzzle was either right resting on his breast or within an inch, exactly where the man would have put it if he wanted to do away with himself, and

exactly, your Honor, as could not have been the case under any other theory.

Well, Your Honor, I call these things to Your Honor's attention. Your Honor has sat up there and Your Honor has had the experience sitting on the bench far longer than I have practiced law, and Your Honor knows and I know that when police arrive at a scene and before the idea of insurance is in the air, let me say, and when we, Your Honor, try to arrive at the truth, which is all in the world that I am interested in in this case, the words spoken or uttered at that time are of far more emphasis and weight in a court of law than what may be surmised later on. And then it is that there is no theory of accident put forth, there is no theory of murder put forth; rather, the wife says, "He had been depressed."

Now, what makes a man depressed, what makes one man depressed and what makes another man not depressed is perhaps for the good Lord to say. It isn't for me to stand here and to try to tell Your Honor. I do know, Your Honor, that in circumstantial cases of murder, as, for example, in the Durant case, the Court sometimes speculates. I believe the Court in that case said this:

"The wellsprings of human conduct * * *"

I am addressing myself now to why this man did it. It is not a burden that I shoulder, because I don't have to, Your Honor, but why did he do it? All right. If Your Honor would invite or would like to have my discussion on it, I would call to

the Court's attention what the Supreme Court said here in 1897, and what they said then is just as true in that kind of a case now as it was then.

The Court: It was a criminal case, wasn't it?

Mr. Clausen: Yes, your Honor. All right, I will skip that, Your Honor, now, and I will proceed to a case——

The Court: No, you don't allow me to interfere with it.

Mr. Clausen: It is the philosophy of what makes men do what they do.

"The wellsprings of human conduct are infinite and infinitely obscure. An act may owe its performance to complex and multiple promptings."

Complex and multiple promptings.

"Who knows each cord its various tone,
Each spring its various bias?"

And who knows? We know what he did in this case, and why he did it, I can surmise.

Now, Your Honor, I have a case here which is very a propos, *Burkett versus the New York Life Insurance Company*, 56 Federal 2nd at 105. This case, Your Honor, is with somewhat similar facts. A man is in a store and he is looking at guns and looking at shells. He goes outside the store and the shot is heard, and the physical facts are reconstructed, and then, Your Honor, the court at the conclusion of the plaintiff's case granted a directed verdict, took the case away from the jury, and the Circuit Court affirmed.

Now, I am addressing myself, Your Honor, to motive for the killing in the *Houston* case because

this court had somewhat the same factual situation. A reconstruction of physical facts that just simply pointed to a deliberate shooting, and when you talk of accident or other causes, it is in the realm of the remote, and so the Court here says:

“Evidence so far disclosed circumstances attending the death of the insured that no room was left for a reasonable hypothesis that it was caused by the act of another. The rebuttable presumption against suicide is overcome by evidence showing that the death was self-inflicted, and a finding that the death was accidental cannot properly be made where a fact or circumstance established by uncontroverted evidence is inconsistent with a reasonable hypothesis that it was due to accident. (Citing cases.) The evidence shows nothing inconsistent with the hypothesis that the death was self-caused.”

In other words, just like in our case, there is nothing inconsistent in any scrap of evidence, Your Honor, that the death was self-caused here.

When you come to motive, then, as this Court pointed out, the fact that the insured's:

“* * * situation and surroundings were such as to make it seem to others unlikely that his worries about his physical condition would make him wish to take his own life was not inconsistent with the existence of the suicidal intent; it being a matter of common knowledge that persons who have abundant reasons to be satisfied with their lot in life do commit suicide. (Citing cases.) There was no evidence having any tendency to prove that the gun was fired as a result of the hammer accidentally

coming in contact with another object with sufficient force to produce that result." Exactly as in this case. No evidence, Your Honor. Even, Your Honor, this hypothesis when presented to their own experts, showed, Your Honor, that when they tried to bang it down with the hammer cocked, they couldn't set it off, and even with the hammer down, the only time they set it off was once, and, Your Honor, that was with bullets that weren't the kind that killed Mr. Houston.

Your Honor will recall that I asked the very simple question of Mr. Bradford, what kind of bullets they used, and finally it developed that even in their tests they had to use—they had not used the kind of bullets that killed Mr. Houston, and I asked the witness if he could just answer the simple question, and he had to admit that the kind of bullets they put in to do the tests with were doctored bullets; they had taken the powder out or they had done something else to them.

To go on with this (56 Federal 2nd 105):

"There was no evidence having any tendency to prove that the gun was fired as a result of the hammer accidentally coming into contact with another object with sufficient force to produce that result. That the firing was so caused is a mere possibility supported by nothing shown by evidence."

Exactly as this case.

"The idea that the firing was so caused is not reasonably reconcilable with facts established by the uncontroverted evidence."

Another case, Your Honor, on the same point, is

that California case of Long against California Western States Life Insurance Company in 43 Cal. 2nd. It was decided by our California Supreme Court last year. And there again, Your Honor, the physical facts demonstrated when the deceased fell, he fell with his hands underneath him, and had he fallen accidentally, his hands would have outstretched, and therefore the Court reasoned that as a matter of law—as a matter of law, Your Honor—he killed himself.

Exactly as in this case. There is no evidence that if the man would fall, he would fall with the gun out like that, with the gun surely pointed against his heart, to make sure the bullet comes out lower in the back.

That case of Long against Cal. Western States Life Insurance Company is 43 Cal 2nd.

Now, the path of the bullet is known; where the butt of the gun was resting is known; the vertical path of the bullet through the body is known. And so I say to Your Honor that from all the evidence, when we enter the realm of speculation, the remote area, it is not in accordance with the physical facts. I would ask Your Honor again, here's a man, he's an experienced hunter, who himself had warned other people that they should assume guns are loaded; who, Your Honor, would know better than anyone that unless he wanted deliberately to do away with himself, not to put the muzzle of a gun against his heart or within an inch from his heart, aimed at the heart area, close to the chest. And now, Your Honor, to have them speculate that he

was so careless or so something or other, de hors the record. There is nothing in the record to prove it. Your Honor, it flies in the face of the physical facts.

We know what he did. We know that he did these things. We know that he went past his wife and we know that he went downstairs only to, within two minutes or a minute and a half, to kill himself? No, Your Honor, there is nothing inconsistent in all this evidence that is before Your Honor, the written as well as the physical facts, that is inconsistent with the idea that he killed himself. But there are a great many inconsistencies and a great many conflicts between any such theory as the other side espoused.

Now as to the possible motives, is it as this Court points out in the Burkett case? Perhaps "the well-springs of human conduct" as the Court said in the Durant case? But in any event, who is to say? I don't know. But here is something that shows all was not well. First, you have a man who is in pain. I don't know what the pain was caused by, but the prior week, Mr. Masters testified, the man was in pain. That may have been a part of the pyramid; I don't know. As the wife said at the time, before insurance was in the air, "He was always depressed or nervous around this time of years." What would make him depressed might not make anyone else depressed, but she said that to the officers. That might have been part of the pyramid. I don't think all was well, Your Honor.

This woman in September—rather, in November,

a few months or so before, wrote this letter. I can imagine some people to whom this would be a trigger—a trigger, if the Court please, of remorse. If you weren't afraid of losing of your job, if you weren't afraid of losing your wife, if you weren't afraid of your family, you might have been afraid of yourself. At least this woman who had been paid off for the accident says things in here.

Well, remorse is a powerful motive.

It might have been the mounting pressure of finances. Here is a man that is successively, year after year after year borrowing on his life insurance. As I tell the Court, the pyramid is building up, you can direct the hypothesis, and then you can come down to what this Court says, that it being a matter of common knowledge that persons who have abundant reasons to be dissatisfied with their lot in life do commit suicide.

There is absolutely in this case, Your Honor, no evidence of accident. A mere possibility is not evidence. We know where the deceased stood, the blood is there. That is where the trail of blood originates. Where the gun was found is shown in the photo. There is nothing beneath it except the floor, the floor board that later was taken up; and we know the path of the bullet and we know where it went through the body, with nothing the hammer of the gun could come in contact with except the man's finger intentionally to pull that gun. So the gun would have rested on the floor with the muzzle against the heart area to make the path that we know was made in the body and which we know

went in the ceiling. And so, as I pointed out, Your Honor, all these circumstances, all the evidence in the case, is consistent with the idea of self-destruction and inconsistent with any other motive.

Why else go to the basement, say nothing about your errand? According to the wife, he had no hunting trips coming up, no reason to go down. But go down in a secluded place, if the Court please, of the basement, alongside where a gun was kept, alongside where ammunition was kept, and put it down and pull the trigger. The Court could see from the demonstration, it is ever so easy with the hand extended to do just that very thing.

The man had no reason to go to the basement for any other purpose at that time when he was expected to eat. He was not dressed to do anything else. They can talk about running around in bathrobes, they can talk about lots of things, but there was no reason to go down.

The gun was in the remote part of the basement, he wasn't casually—don't you see the point I am making, your Honor?—he wasn't casually going by some place and picking up a gun. He went to the corner for a purpose, and that purpose was only to get the gun to shoot himself.

And there as the test alongside the declivity there in the center shows, it is the same kind of a mark there in the center as each of the other two from pulling a trigger. And so the gun is found then near ammunition, and there is a wound which shows the muzzle was against the heart area and that the gun was so short that it would require a person of his

height, six feet two inches, to bend over parallel plus in order to pull that trigger and make sure it went through the heart, and we say then, your Honor, for all those reasons and physical facts that in this case just as a matter of law—as a matter of law, your Honor—there should be a finding for the defendant on the issue of suicide.

I have invited your Honor's attention to the Burkett case, I have invited the Court's attention when we were discussing admissibility of evidence to the Long case. I would like to invite the Court's attention to another case, Saecker versus Metropolitan Life Insurance Company, 51 Cal. App. 2nd 479, where again the Court discusses explanations other than suicide but where the findings of suicide will be upheld, and there the assured, who had been ill, had been confined to the hospital. During the night his body was found on the concrete pavement of a light well at a point just below a hospital window. He was then dressed in pajamas and trousers and had on slippers. The window shade was found to be up, the window fully opened, the screen unlocked. There was no damage to the blind, the screen, nor to the window. Findings in favor of the company were affirmed even though there the beneficiary argued that the death could be explained in ways other than suicide, in that he may have become dizzy and slipped and had fallen while attempting to open the window, that he may have leaned out to observe something, lose his balance, and other equally inapplicable explanations.

We say, your Honor, that under all the facts of

the case here, everything is consistent with suicide, everything is inconsistent with any other explanation.

Now, your Honor, some of the things mentioned by counsel on this issue. He mentioned the ten minute interval, and he said ten minutes from the time the man got up to the time he had gone down to shoot himself was not plausible. We say to your Honor quite the contrary: A man makes his mind up, such as our member of the bar here, a man with whom I had been doing business, Mr. Cohen of Steinhart's office, jumps off the Golden Gate Bridge. Well, your Honor, it didn't take him long to do that. A man who has made his mind up to shoot himself doesn't say anything to anybody else, but does it. The impulse is there. The mounting pyramid is built up and the decision has been made in his mind to do away with himself for the reasons he is moved by, and so he does it. Exactly the same here, your Honor. Where I asked what time elapsed between passing in the kitchen, in the hallway, the witness put it at one and a half to two minutes; there again, the man made his mind up and he was doing down to do it.

Now, they said something about the guns being kept loaded. Well, if the guns were kept loaded or whether he had *to the* bag to get ammunition to put in it, it would be all the same. But in any event, he was careful enough a hunter and careful enough a gunsman to tell people to assume so. That was the evidence.

And then, your Honor, the statement was made

that he had to lean over to go into this portion of the basement. Well, your Honor, that portion was five and a half feet high. He had to lean over a great deal more. He had to lean over a great deal more than five and a half feet, your Honor, to come down to that position.

Then, your Honor, the statement was made about Dr. Kirk and Dr. Bradford dropping it to fire. Well, as I recall the testimony, while they tried to do it in various ways, they jammed, they hit on the side, they hit it on the stock, they hit it in various other ways and when the gun was cocked they couldn't fire it, and the only time they could get it to fire at all was once by dropping it, and there is no proof of any dropping on that board in any place, and then it was only with these bullets that they themselves had fixed up which were not the kind of bullets that were used by Mr. Houston when he killed himself.

And, your Honor, there are other cases—I pointed out the Burkett case, the Long case, that if the man had stumbled or fallen, he would have gone out with the gun, the gun would have been held out.

Well, your Honor, about the glasses. He didn't have glasses on at the time, but I asked the daughter if there was anything unusual about that and she said no. Of course, it wouldn't make any difference. He could see the daughter, he could see going through the kitchen, he could see and talk to the daughter.

Now, then, statement was also made that the coroner's jury heard our witnesses. Well, that isn't

correct. I asked Inspector Parker this morning if he had testified before the coroner's jury and he said no.

And then, your Honor, statement was made that the bag of ammunition was closed. Well, I got it from Mrs. Clayton that the bag was just an ordinary paper bag. There is no closing to that, whether it is folded over or not.

Then that statement that was made about the deceased struggling from this point to here. Well, significantly, your Honor, there is no evidence of any outcry, no evidence of any accident in that form. Rather, on the other hand, I would imagine that if a person is shot through the heart that instinctively the reflexes would operate in some form as to bring the body out to where it was found.

Well, your Honor, that's that issue. We say to your Honor that a decisive, as I said before, decisive finding in this case, in my opinion, decisive from the physical facts, is that the man committed suicide.

Now, on the other defense of misrepresentations. I think counsel is in error. He mentioned something about the application and the man's name on there being Utley. The man's name on there, "Utley," is not any Utley who testified in this case. His father testified in this case, his sister testified in this case, and his sister conceded that she was a hostile witness.

In the deposition she went on to say, your Honor, that she had been a close friend—I am speaking about the type of information asked for by the in-

insurance company and the answers given by the insured in respect of his drinking habits.

Now, the witness Pearson and also Wilkerson, they both testified on it, and of course you are not going to have people come in here who are friends of the deceased who have participated—more specially if they participated in lunches, dinners, affairs, organizations—all the affairs—and come in here and testify that this man was intoxicated. The point was, your Honor, that he did do a lot of drinking. Now, he did do a lot of drinking. He drank in the mornings, he drank at noon, and he drank at night, and, your Honor, the testimony came, as I again point out, from hostile witnesses. In fact, the daughter of Mr. Utley who did testify here said she was hostile; she had been a close friend of Mr. Houston, she testified, for ten years, and on page 3 of her deposition she testified she had seen him have a drink in the morning. Here on page 6 of her deposition—this has all been read into the record, your Honor—she testified that she had seen him sit down and drink eight highballs. Here on page 7 the difference between a man's conduct in San Francisco and this area, and when he was up in Oregon, was made clear because she characterized it as a Jekyll-Hyde transformation, and, as she pointed out, he himself told her three different kinds of stories about this accident.

Well, your Honor, I just throw the cloak over that episode, the drinking episode, and sum it up because here on page 9 a hostile witness, hostile to us, says this, after telling about his habits up there

in walking in and so forth with mud on his boots and liking a roaring good time:

"Let me ask you this, Mrs. Wilkerson: Would you say that Mr. Houston when he was up there without his wife would be under the influence of alcohol a great deal of the time?"

The answer is: "Yes."

Page 9, lines 10 to 13.

Well, your Honor, I just accept the fact as what it is. Now, that is what the witness, a witness who is hostile to us, said. And, your Honor, under the law it gives the right to the insurance company because of the facts. I have invited the Court's attention to the specific answers and questions in the application. I would call or invite the Court's attention, then to the law on the subject, the California Insurance Code, Section 331:

"A representation is false when the facts fail to correspond with the assertion or stipulation. Section 359:

"If a representation is false in a material point, the injured party is entitled to rescind the contract from the time the representation becomes false."

We have the right to defend, as the policy itself gives us the right here to defend, or, as was set forth in the case of *Maggini v. West Coast Life Insurance Company*, and then, your Honor, in the case of *Telford* against *New York Insurance Company*, 9 Cal. 2d. 103, the Court stated:

"A false representation or concealment of fact, whether intentional or unintentional, which is mate-

rial to the risk, vitiates the policy. The presence of an intention to deceive is not essential."

And the purpose of this rule is well brought out in these cases, *Robinson v. The Occidental Life Insurance Company*, 131 A.C.A. 711, 716, where the Court said:

"The insurance company is entitled to determine for itself what risks it will accept and therefore to know all the facts pertaining to the applicant's physical condition. It has a right to select those whom it will insure and to rely on him who will be insured for such information as it desires as a basis for its determination to the end that a wise discrimination may be exercised in selecting risks."

McEwen v. New York Life Insurance Company, 42 Cal. App. 133:

"If you find from the evidence that the deceased was in the habit of using wines, spirits or malt liquors and that had persisted for some time and that he had on more than one occasion used them to excess, then you find the representations herein are false."

This rule that an unintentional misrepresentation of a material fact warrants rescission of a life insurance policy is likewise, your Honor, the law of *Mutual Life Insurance Company against Chandler*, 252 Pac. 2559, an Oregon case, of the year 1927, and so, your Honor, to conclude whether on the ground of suicide or on the ground of misrepresentations, in either event or for both reasons, we sincerely submit to your Honor judgment should go for the defendant.

Mr. Angell: The first response I would like to make, Your Honor, is to the question of opening and closing. It is my own understanding—I don't want to take advantage of Mr. Clausen—that the plaintiff has the opening and closing, and, as a matter of fact, the pleadings are in such state that all the facts which we had to prove on an opening of our case were admitted on the pleadings and only the affirmative defenses were in dispute and therefore as Mr. Clausen was ready and willing to go ahead, that did not change the right of counsel to the opening and closing. That is my understanding. If the Court feels I am incorrect in that, I certainly would abide by the determination of the Court. I did not understand——

The Court: What is the importance of that?

Mr. Angell: I don't know.

Now, with respect to this issue of intoxication, I am going to take that first because counsel was reading from cases here, and it is interesting to note that counsel didn't call attention to what the representation in that last case was because that is all the materiality that is just in that. Here Mr. Houston said, "I drink: I use alcoholic beverages, yes." That was his answer affirmatively. He didn't say, "No." That would have been a misrepresentation. He said, "Yes," and according to the way he construed his drinking, it was social, only occasionally.

Now, this has been constantly before the courts of California and every single case has to stand on its own legs and that is as to what was said

and then what the conduct of the person was. But here is a case which is very apt on the facts and on the issues that we have, *Mayfield vs. Fidelity & Casualty Company*, 16 Cal. App. 2d. 611, and at page 627,

“With respect to the feature of waiver, it is proper further to observe that appellant’s contention that no waiver of any provision of the policy could be accomplished by an agent of the insurer, is based on the assumption that the fact of intemperance of the assured was established by the evidence. With this basic assumption, we can not agree. The jury returned a general verdict in favor of respondent. In support of this verdict and the judgment which followed it, a reviewing court is entitled to assume that the jury found that the affirmative defense of misrepresentation had not been established by appellant. As heretofore noted, the misrepresentation relied upon by appellant as sufficient to enable it to avoid its contract related not to a definite, readily definable fact, but to a matter which necessarily called for an expression of opinion. Applicant itself selected the language which formed the inquiry and is therefore responsible for any lack of clarity or ambiguity or difficulty or definition of the phraseology which it elected to employ.”

Now, that is what we have here.

“The meaning of the word ‘temperate’ as used in the application for insurance is largely a matter of opinion, depending upon the liberality of view entertained upon the subject by the individual. In the absence of any standard of measurement,

the question was one of fact to be determined by the jurors, whose conclusion with respect thereto would depend largely upon their opinion as to what the word 'temperate' means. The record is bare of any showing that the insured used intoxicants to the extent that his indulgence therein interfered with the conduct of the business in which he was engaged. There was evidence that he drank to an extent that made him quarrelsome and ugly and inflicted upon respondent a course of great mental anguish. Here again, the factor of an opinion of an individual complicates the problem. Different individuals do not entertain the same opinion with respect to the use of intoxicating liquor. For all that appears, respondent may be so constituted that the consumption by her husband of a very moderate quantity of intoxicating liquor on one occasion as on a number of occasions widely separated in point of time may have caused her keen mental anguish. All of this simply serves to emphasize the fact that the question of whether an individual is temperate or intemperate in the use of alcoholic beverages depends largely on opinion and presents a problem which is eminently proper to be determined by the triers of fact. We think, therefore, that the trial court did not err in denying appellant's motion for a directed verdict."

In other words, Your Honor, it is nothing scientific or nothing accurate in the words 'you use alcohol to excess?' One man says, "No." One man says, "Yes," if he drank the same amount.

I maintain, Your Honor, that the proper ap-

proach to those words is simply this, that is, the testimony was produced here by the plaintiff of all the social people they went to parties with, the people that they attended the insurance company banquets and meetings, conventions, the people who were daily in his office and said they never saw Mr. Houston where he couldn't handle his business or that he was ever incoherent or staggered or didn't know what he was doing; he was always in a condition to drive his car. Even as Mrs. Wilkerson testified in cross examination, that she drank along with him, there may be a case in her testimony, Your Honor, as the man who said to his wife, "I wouldn't drink that other drink if I were you, dear. Your face is getting blurry," because it may be that she defines those things differently than anyone else would. Those are merely opinions, and I think the question of intoxication or misrepresentation in the insurance application here, Your Honor, there is absolutely no evidence, no substantial evidence to which anyone could say Mr. Houston in any way drank so that this insurance company would not have taken the policy had they known exactly how many drinks he took and when. They could have asked those questions if they wanted to, but they didn't. They left it to his opinion for him to tell. They could have looked into it at any time they wanted. They had noticed when they saw the application that he did use, take drinks occasionally, socially. They didn't know how much, but they could have looked into how much.

I submit, Your Honor, it is common experience,

if every insurance company in the land took a position that Canada Life takes before this Court to-day, there would be an awful number of insurance policies that are in effect now with answers just like that that would be canceled after collecting premiums on them for years. I submit, Your Honor, that what is troubling the defendant in this case is not any great moral sense of misrepresentation. It is the fact that Mr. Houston met his death so soon after taking out the policy. There is not even the remotest suggestion that Mr. Houston took it out with the intention to defraud the insurance company by committing suicide. That is one of the things I looked for and that has not been made. However, to determine a motive, realizing the absence of motive in suicide, Your Honor, is probably one of the greatest requirements before a court or jury will sustain a verdict or a judgment of suicide, that there be a motive. In all these cases that were cited, I would be very much interested to have Your Honor look at what motives were. The one case, the Long case, that was cited here to Your Honor several times, the man grabbed a gun or a pistol and had run through a door and said, "You'll never see me again," and the next thing you know the gun went off and he was dead. Now, that would be almost a part of the *res gestae*, Your Honor, a declaration. You would be almost bound to accept as from the man himself that he was going to commit suicide.

I would like to call Your Honor's attention to a couple of cases here that are extremely interest-

ing from the factual side, and that is this *Beers vs. California State Life Insurance Company*, 87 Cal. App. 440, at 456. In this case, Your Honor, the deceased, a Miss Beers, went to a drugstore and purchased strychnine and she said she wanted it to destroy rats. She seemed very light-hearted and gay and when she walked out there was nothing to indicate any reason for her to buy that outside of the purpose stated, for rats, she said. In other words, one of the witnesses testified that when she went down to purchase this strychnine that she stated she wanted it for rats. The evidence then disclosed during the night that Miss Beers was taken with cramps and pains, she died, and subsequently it was learned she died from the effect of strychnine poisoning. The jury found she had not committed suicide, that it was accidental.

On appeal, the appellate court had this to say:

“It must be borne in mind that the defendant entered the trial charged with the burden of overthrowing the presumption that the deceased was sane and that her death was not suicidal but from a natural cause. It rested upon the defendant to overcome said presumption, or in other words, to support the affirmative defense of suicide ‘by a preponderance of clear and satisfactory evidence, direct or circumstantial.’ (37 Corpus Juris, Section 443, page 640, and cases cited in footnotes and also the above named cases.) And whether the defendant introduced sufficient satisfactory proof to overcome that presumption or to sustain that defense was a question to be solved by the jury, with whose

conclusion we are not privileged, legally, to interfere unless the evidence of suicide is upon its face obviously such as to compel us to hold that no inference but that of intentional self-destruction may reasonably be drawn."

Now, here we have, Your Honor, a young lady going down and buying strychnine. The next thing you know, she is killed by it.

Another case, Your Honor, is the Prudential Insurance Company of America vs. Baciocco, and this is 29 Fed. 2d. 966 and decided by Judge Dietrich with Judges Norcross and Gilbert sitting with him. In this case the deceased was found at the bottom of a cliff out here at the Cliff House. He was 29 years old, had a wife and two children. The court found he was industrious, temperate, but as bearing on motive for suicide, the appellant adduced evidence tending to show that for some time prior to his death he had maintained unduly intimate relations with a woman other than his wife and that he was in a measure responsible for the dissipation of the assets of the business in which he and appellee were engaged. His death occurred on a Saturday night or early Sunday morning. On the preceding Wednesday his "girl friend" with her brother and sister went on a vacation to Ukiah, in an automobile which he had rented and authorized the garage to let them have. He went by train the following day and all four were in and about Ukiah until Saturday when they all came back to San Francisco in the automobile, arriving about 7:00 o'clock in the evening. He and the girl

had dinner together at a restaurant and drove down the Peninsula until 12:30 in the morning when he took her home and left in the automobile. The girl testified he had not been drinking and he did not appear to be uncommonly melancholy. He didn't say where he intended to go and she took it for granted he was going home. And the next thing, they found his body washed up on the beach.

Now, obviously all these things are introduced to show motive, Your Honor, and the court in this case held that there was insufficient evidence to sustain the burden of proving insured committed suicide.

Now, the defendants here realize the importance of motive. All the way through they have tried to drag in such incidents as the automobile accident which was futile, certainly, to the nth degree. Claim is made that that letter—so much is made of it—the letter written by the girl making demands for money. The letter was brought here and read in evidence, read at my insistence, and instead of being a demand, the lady only asked that she might as a courtesy have a loan to get to Los Angeles, and the letter was answered by the secretary which, I take it, was proper to do, and the secretary wrote and suggested that she get in touch with the insurance carrier who had made the settlement and said that if there was anything more they could do, she felt certainly that they would do the right thing by her. There is no evidence that at

any time after that Mr. Houston or anyone else ever heard from this lady again.

Now, then, in the argument—I just want to comment on a few statements made—all the way through in his argument Mr. Clausen referred to the statements of the officer as to what Mrs. Houston said to him that morning or that afternoon, on February 22, when the officers came to the house on Mr. Houston's death. Repeatedly Mr. Clausen said that Mrs. Houston had told the officers that he was depressed and that was not stated once, it was stated several times.

So that there can be no question in the recollection of Your Honor, I wish to see the Exhibit 8 of defendants (sic) and the notes of Officer Pine. His statement was, and he is the only one that testified on them because Mr. Parker testified he didn't interview them when he talked to them this morning.

Pardon me. This is the one I want. But this (exhibit) isn't the one. I guess it is Exhibit J, Defendant's Exhibit J.

Officer Pine's statement was that Mrs. Houston said he had been depressed or worried or something about these reports before but he was in fine spirits lately, and I believe that is the exact language used by Officer Pine.

(Colloquy between counsel and the clerk with reference to exhibits.)

Mr. Angell: I am reading from this report, Defendant's Exhibit G, in which he said:

"Mrs. Houston said at first that he has periods

of depression and was depressed lately. Later, however, she said that over this weekend he had been in fine spirits."

Now, that's the statement by Officer Pine—"over this weekend he had been in fine spirits." That coincides exactly, Your Honor, with the testimony of all the other witnesses.

You don't have to go to Mrs. Houston who was speaking right after she had come upon the body of Mr. Houston and then she is asked about these things. She later said in her testimony when asked about the use of the word "depression," "I didn't mean that; I meant that he was preoccupied or that he was thinking about this report, which he did every year."

And Miss Hoffman explained that. She said that every year Mr. Houston had to get this out, that it was required by the law, and not only the law of New Zealand but the law of every state in which they did business here. The evidence from the office, Mr. Masters, Miss Hoffman and Mr. Houston is that he had been in fine spirits lately; and Ann says in her testimony she saw no evidence of any worry or anything unusual in her father. And equally important is the testimony of some ten to fifteen other witnesses, all produced, who had seen the witness within one, two, three days of what had happened.

Great emphasis has been put on the position which Mr. Houston was standing in at the time. In fact, that is the only evidence in this case—the only evidence, if it be evidence, that that thing could

have been self-inflicted. There is no motive established. You just simply have to say that a person of Mr. Houston's size and in the place he was could not have gone back there and be shot as he was without having it self-inflicted. I submit, Your Honor, that there is absolutely no basis for such a violent assumption. The two men here who could answer that, Mr. Kirk and Mr. Bradford, both testified that they had discharged that gun by dropping it. Your Honor knows in how many different ways an accident can happen, and for us to put ourselves in a position—to get that exactly in the position that it was when it went off, the cases all say that that testimony is not subject to expert opinion; it is nothing on which we can bring anyone here to testify; that we can show what did happen and then it is for the trier of the fact to determine whether that could have been accident or must it be self-inflicted. We submit that with all of the background testimony in this case, and all of it without conflict, and with the testimony being totally and completely void of any motive which could have inspired Mr. Houston to do away with himself, that the one and only one conclusion we can arrive at would be that this was an accidental shooting.

I again call to Your Honor's attention the number of factors that are present in this case which I think you will find present in no other case in such abundance and such profusion, and that is a complete and total lack of any reason to do the thing. Also the manner and the place in which it

was done, the circumstances and environment at the time of its doing.

Mr. Clausen tries to wave off that people commit suicide on an inspiration. He draws the classical example of all the people that jumped off the Golden Gate Bridge. Practically all those that have jumped off that bridge, Your Honor, have driven out there and they had taken a long time to drive and they had had a long time to contemplate before they arrived, and I without knowing anything about the evidence as to each man who jumped over that bridge, how long he contemplated it, whether he told anybody he was going to do it, whether he was under the influence of liquor, whether he was suffering from some psychic difficulty, all those things are absent, so that I can't undertake to explain why people went over there. We must look at this case, not this case here or some other case, but just the facts that are before the Court in this case. Again I say that Mr. Clausen has not been able to produce a single witness, not a one, to give any motive behind Mr. Houston's doing this. He relies lock, stock and barrel upon the fact that a man couldn't get in that position except intentionally, except he did it on purpose.

Well, under the testimony of Mr. Kirk and Mr. Bradford, he very definitely could; he could. Mr. Bradford very easily showed Your Honor how you could bend over there trying to pull this here up, and if you touched the trigger when that thing

was in a cocked position it would have gone off. Now, that would have been accidental.

Now, if that was pulled open and Your Honor will remember, Mr. Bradford placed great emphasis on the fact that this action is loose here and that a pulling out of this gun any place would have flipped this. The minute this is flipped out, that trigger is without any guard. That a careful man, as Mr. Houston was, if he had pulled that out of there and noted that that—or heard that open, like that—obviously before he started out through that crowded place, it would only be an act of common good sense to close that. Now, did he, inadvertently because he didn't have his glasses or because he was careless on this particular occasion or what, but it is easy enough to bend over to close that and trigger that. It is also, as I stated before, easy—that barrel could have been greased, as lots of men do when they put their guns away, grease them, and as it went down—as it did, he went down with it to catch it and the thing went off just from a banging on the floor—and as Mr. Bradford and Dr. Kirk both said it could. So obvious is that argument to Mr. Clausen, and it was equally obvious to the jury in the coroner's verdict because they couldn't determine it, and the evidence is that both Dr. Kirk and Mr. Bradford were before the coroner's jury, that he says that the man would have to be shot by somebody else, shot by somebody else or it had to be suicide. Well, that is not a conclusion which can be drawn from the evidence. We have never contended that he was shot

by anybody else. The police determined that the morning they were up there and they said there was no evidence of any third party, and that is what they were there really to investigate. The evidence only is that Mr. Houston was shot in that particular location, at that particular time, and there is not one single iota, scrap of evidence, to show how that gun was discharged, to show how Mr. Houston got in that position, to show that he intentionally went down there to commit suicide. On the contrary, the compelling and absolutely only evidence is that Mr. Houston did not go down there to commit suicide. He went down there either to get that gun to clean it or to do something with it, and something happened while he was there that threw him onto that gun, discharging it, and that is the only rational conclusion from all the evidence before this Court.

Now, Mr. Clausen says that these are the acts he depended upon to show that there was a suicide: He said nothing to his wife or daughter. Well, of course he didn't say anything to his wife or daughter. He went down there merely awaiting breakfast and he said—his daughter said to him—she was singing, "Oh, What A Beautiful Morning," and he said, "It certainly is." She said, "We are going to have steak for breakfast," and he said, "That's fine." So he did say something to his daughter and he didn't say anything to his wife. Now, if a man were going down there to do away with himself, it is more rational that he would have said something to his family, a goodbye or

something, in some way. He wouldn't just coldly, a man with a warm disposition as shown in this case and the affection that that man had for his family, that he would coldly walk down past them to his eternity and not even so much as say goodbye to them. It just doesn't make sense. Certainly, if he were going to commit suicide, he would have said something to them and he would have said a farewell to them in some way.

Now, Mr. Clausen says he can't delve into the man's mind, an impulse for suicide, and I will go right down the line with him. But yet he wants Your Honor to indulge in that and to come up with a conclusion in this case that Mr. Houston did commit suicide so that the Canada Life can escape their liability on a life insurance policy. The Canada Life entered into that contract, I assume, in good faith. Mr. Houston entered into it in good faith. There is no evidence of any fraud whatsoever in getting that insurance. It was just one insurance man to another. Then the insurance company should bear the loss in those cases where they have not had the good fortune that they be in force and effect as long as they would like to have them in order to come out even on the score. But that is what insurance is for.

Now, I say that before you say a man has committed suicide, which is a stigma to leave behind for any man, and particularly a man of Mr. Houston's standing and environment, home life, his religious life, his business life, to dub that man as a suicide upon the facts that have been produced

here, namely, just that he was leaning over that gun, in that position, at the time that the shell was discharged, I say, His Honor, is drawing heavily on the imagination.

We don't have to guess on it. We have the testimony of these experts that that gun could be, and they did discharge it by simply dropping it. Now, what the different methods are that that could be dropped accidentally, goodness, I wouldn't even indulge in the realm of speculation. I thought of some; Your Honor can think of some, and there would be dozens of others. He might have even slipped and gone up in the air and come down on top of that. Saying that the powder burns showed that that was close to him. It did, Your Honor, but it does not show—that is just the point that I brought out from Mr. Bradford—it shows that that was not against the body at the time it was shot; it was about an inch away. Mr. Bradford testified that if that had been against the body, there would not have been any controversy, there would have been no oxygen to have it explode. If he had leaned over to do away with himself and to be sure he got to his heart, he would have been darned sure that would have been up against him, to make sure of it. And to think, to be so foolish as to argue that one familiar with guns would go down there and commit suicide in that way, to think that he can hit a vital organ in that position. The fact is that he did not. He bled to death. The certificate of death that is in evidence shows that. He didn't hit—. The chance of a man hitting his

heart when leaning over trying to find his heart is very remote. A man who, in his position, first, I say if you are going to draw on speculation, it is only speculation—that he would not use that kind of a weapon at all, that he would use a pistol; second, a man who had a family like that is concerned and if he were considering that, he would have gone some place else to do it; third, he would never have done it down there where he might have killed or seriously wounded one of his own family. He would never have come to the conclusion to do the act within ten minutes of the time he was awakened out of a sound sleep and to go down in there and to do it. The evidence is without dispute, and therefore we don't have to conjecture that he did go around in his pajamas, his bathrobe, and, as Mrs. Houston said, they all did it, the whole family. And that is common in many families. That he went down there when he is called to breakfast to look at his saddles or guns or fishing rods, Mrs. Houston said he did it frequently, that it was just a habit of his. I know, I have the same habit; my wife calls me to dinner and I'm headed out to hoe in the back yard.

So I say that the only evidence at all that they produced here, there was a little mannikin that was brought in here only to illustrate the testimony of a witness who,—all he did—was take the testimony of the coroner's jury and reconstruct the direction of the bullet, and under the cases that isn't even admissible and can be stricken right out of the record. I am sure Your Honor would not de-

cide a case on evidence which is not admissible. The cases are so complete and so many that the position that a deceased was in at the time he was shot or was wounded is not subject to expert testimony, absolutely can not be testified to. The circumstances of the shooting, the measurements, the direction of the bullet through the body, are proper, but certainly the position that the defendant was in—we do not know Mr. Houston was in that position, he could have been in half a dozen other positions and still be bent over like that—is not admissible. He might have gone up in the air with his legs up in the air and fallen on this thing as he came down. There's just any one of a dozen ways that thing could have happened, and yet we are told that we have to accept this.

Well, as I say, under the cases, those are clearly not admissible. They are collected together under Cal. Juris.; they have them under Ballistics:

“Expert testimony on questions of Ballistics is admissible. An expert witness may testify, for example, to his opinion as to the caliber of bullet which caused a wound or as to the resemblance or identify of the fatal bullets with bullets of the accused's gun. He may also testify to the operation of a gun and the difficulties in firing it from certain positions, the course a bullet took in the body of a victim or its place of entrance and exit. * * *

But the position or direction from which a gun was fired, the probable position of the victim when it was fired, whether it was fired accidentally or with criminal intent, or the distance at which the

victim stood from the muzzle of the gun at the time of its discharge are not proper subject matters for expert testimony * * *".

Did I give the citation? That's out of 19 Cal. Jur. 2d, "Evidence," Section 367, page 95, and in the footnotes a large group of cases are related there. And they are without break.

Now, much point was made about these experts here having taken a bullet out of the shell before they fired it. It shows the extent to which defendants have to go to defend this case. They said they didn't have bullets like that which shot Mr. Houston but a different kind of a bullet. Well, I think Your Honor is hunter enough to know that a 30-30 bullet is a 30-30 bullet, and I think Your Honor knows how a 30-30 works; just the same as any other bullet: there is a cap in one end and then some powder and then some shell, and it is the shell that goes out or the bullet, rather, which does the damage. The removal of the lethal part of that shell in no way affects the cap which discharges. The only difference would be that there would be no bullet to go through and do damage. And the testimony was that the shells used by them came out of that very bag which was on the little stand in the corner, and that's where they got the shells they used in the gun. So if there was any need to identify those bullets or shells—(bullets: the shell is the whole thing)—why, I think that the argument these were "doctored"—that was the word—is certainly specious.

Mr. Clausen said that Mrs. Houston was talking

to the officer before "insurance" was in the air, which started the implication that Mrs. Houston changed her testimony—that she changed her statement to the officer that he was depressed. I have read Your Honor what the officer said she said and her testimony that she doesn't believe she used the word "depressed," but she said that she thought he was worried or preoccupied regarding this report. The officer, if Your Honor recalls, was asked if he had taken down this conversation verbatim and he said no, that he just remembered it when he got back to the office when he wrote up what happened there, and he just put that in. He couldn't say those were the exact words she used. Well, she says that if she used them, she didn't mean "depression" in that sense. Your Honor will remember, she clearly stated to Your Honor, in response to a question of Your Honor, that she did not mean "depression" in that sense, "melancholy," but "preoccupied" or—more preoccupied than worried.

Now, Mr. Clausen seems to want to throw the burden of proof of cause of death onto the plaintiff rather than assuming it himself. He says there was nothing inconsistent with the theory of suicide. Well, I think that it is just the other way around, Your Honor. The thing we have got to find is that this thing could not have happened other than by suicide. I think the cases are all clear on that, and I would like to submit a memorandum to opposing counsel and to Your Honor to that effect as to the proof.

Now, then, when it came to motive or the things that were assigned by Mr. Clausen as the motive, pain—well, the only pain that was testified to there was that Mr. Houston had been lifting some kind of equipment, that he strained his back a little bit and had that pain. There was no evidence in any way that it bothered him or that it impeded anything he did. On the contrary, the evidence was just the opposite.

Then “depressed,” Your Honor, “around this time of the year.” There is no such evidence, either by Officer Pine or by Mrs. Houston.

Then he said this woman—he tried to drag her into this thing. Well, he sure did and he said, “Maybe it was remorse.” Well, I see nothing in the evidence—I think Your Honor will agree—that even remotely indicated any or caused remorse or required any explanation.

“Finances, borrowing on the life insurance.” Grabbing at straws. The evidence here is from Exhibit 8 which I hold in my hand, Your Honor, and I ask Your Honor to look at this exhibit; this man had quick assets from this exhibit, somewhere around eighty-five to ninety thousand dollars. Now, it is well known that lots of people who have plenty of money keep borrowing money and they that do are very good business men because they usually have a place for the money to work, where they can make more on it than they have to pay for interest. There is no evidence, except mere conjecture on the part of counsel, that Mr. Houston had any financial worries whatsoever. On the con-

trary, Mr. Utley testified that not only did they not have worries about it, but they were contemplating expending this farming venture to some extent, and he was present when Mr. Houston had called and made arrangements to finance some \$30,000 additional to buy more property. So I think that is out.

Accordingly, Your Honor, we will leave this with Your Honor and request judgment for the plaintiff. I have called to Your Honor's attention some twenty different things which in my opinion show this case to have been not suicide and that there was no misrepresentation. Plaintiff respectfully requests judgment.

The Court: Well, you have cited a number of cases. I will give you five, five and five. Who is going forward?

Mr. Angell: I will be glad to first.

The Court: Is that agreeable to both sides?

Mr. Clausen: If it is the position of the plaintiff, Your Honor, that the burden is on the defendant, I think the defendant should open and close, myself, although, if it is the Court's feeling that counsel should open and close for the clarity of the problem, that's satisfactory with me. Whatever Your Honor feels.

The Court: You will have a full opportunity to meet.

Mr. Clausen: To reply?

The Court: Yes.

Mr. Clausen: It is satisfactory with me that Mr. Angell opens.

The Court: Five, five and five. That will take it to December 5.

I should like to have the reporter give me a transcript of this argument. Is that agreeable to both sides? You will make arrangements with the reporter?

Mr. Angell: Yes.

Mr. Clausen: Yes.

(Submitted, five, five and five.)

[Endorsed]: Filed April 12, 1956.

[Endorsed]: No. 15102. United States Court of Appeals for the Ninth Circuit. The Canada Life Assurance Company, a Corporation, Appellant, vs. Charlotte S. Houston, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: April 12, 1956.

Docketed: April 17, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15102

CHARLOTTE S. HOUSTON,

Plaintiff and Respondent,

vs.

THE CANADA LIFE ASSURANCE COM-
PANY,

Defendant and Appellant.

APPELLANT'S STATEMENT OF POINTS

Appellant above named states that the points on which it intends to rely on the appeal in this action are as follows:

1. The trial court erred in failing to conclude as a matter of law that the insured, William M. Houston, committed suicide, and in finding that his death was accidental.

2. The trial court erred in finding that the written application for life insurance of William M. Houston contained no false and fraudulent representations with respect to William M. Houston's use of alcoholic stimulants.

3. The trial court erred in finding that the use by said William M. Houston of alcohol was neither excessive nor unusual.

4. The trial court erred in finding that the answers of said William M. Houston in said application did not constitute a material representation or any misrepresentation with respect to the insured's use of alcoholic stimulants.

5. The trial court erred in finding that the statements in said application were true and were not known by said William M. Houston to be untrue and false.

6. The trial court erred in excluding testimony by defendant's Assistant Secretary that defendant relied upon the answers of the insured in the application.

7. The trial court erred in striking from evidence the report of J. W. Van Doren, insurance agent, dated October 22, 1953.

8. The trial court erred in excluding from evidence the expert opinion of Dr. A. E. Bennett.

9. The trial court erred in excluding the testimony of Mr. James H. Wainwright, Assistant Secretary and Claims Agent of defendant, to the effect that if the company had had knowledge of the drinking habits of Mr. Houston the company would not have issued its policy of insurance.

10. The trial court erred in excluding testimony of the company practice at the time the policy was issued on unfavorable drinking habits.

11. The trial court erred in admitting into evidence the certificate of death of William M. Houston certified on March 29, 1954.

12. The trial court erred in admitting into evidence the verdict of the coroner's jury of March 29, 1954.

13. The trial court erred in admitting into evidence plaintiff's Exhibit 7.

14. The trial court erred in denying defendant's motion to strike the testimony of Dr. Paul

L. Kirk and Lowell Bradford as to firing experiments in the firing tests of the gun, Exhibit B, other than by pulling the trigger.

15. The trial court erred in excluding from evidence the conclusions as to the method of death by Officers Pine and Parker.

16. The trial court erred in excluding evidence as to the conclusion of the coroner as to the method of death and his testimony respecting the submission of the question to a coroner's jury.

17. The trial court erred in other rules of evidence.

18. The trial court erred in finding that interest was due on the principal sum of \$28,552.00 from May 4, 1954.

Dated: May 4, 1956.

HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,
FRANCIS V. KEESLING, JR.,

/s/ By HENRY C. CLAUSEN, JR.

Attorneys for Defendant and
Appellant

[Endorsed]: Filed May 5, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPLICATION FOR ORDER PERMITTING
REFERENCE TO RECORD WITHOUT
PRINTING

Appellee, Charlotte S. Houston, hereby applies to the Court for an order permitting reference to the record on appeal without printing and respectfully shows:

Appellant has designated the entire record for printing except only the life insurance policy, which is the basis of suit herein, of which Appellant has designated but two clauses, to-wit, the suicide clause and the commutation clause.

While Appellee does not desire to burden unduly the record in this appeal with the printing of all of the detailed provisions of said policy of life insurance, other provisions than those designated by appellant may possibly become pertinent in the consideration and determination of the issues raised by appellant in the within appeal.

Appellee accordingly respectfully requests the order of this Court permitting counsel for either party to refer to and print in their respective briefs such additional provisions of the policy of life insurance, which is the subject of suit herein, as may be pertinent to the determination of the issues raised on appeal.

Dated: May 29, 1956.

Respectfully submitted,

PHILIP H. ANGELL,
ROBERT M. ADAMS, JR.,

/s/ By ROBERT M. ADAMS, JR.,
Attorneys for Appellee, Charlotte S.
Houston

Counsel for the Appellant hereby stipulate and agree that there is no objection on the part of Appellant to the granting of the foregoing request for order permitting reference to portions of the record without printing, as hereinabove requested.

Dated: May 31, 1956.

HENRY C. CLAUSEN,
HENRY C. CLAUSEN, JR.,
FRANCIS V. KEESLING, JR.,

/s/ By HENRY C. CLAUSEN, JR.,
Attorneys for Appellant, The Canada Life Assurance Company

[Endorsed]: Filed June 2, 1956. Paul P. O'Brien,
Clerk.

No. 15,102

In the
United States Court of Appeals
For the Ninth Circuit

THE CANADA LIFE ASSURANCE COMPANY,
a corporation,

Appellant,

vs.

CHARLOTTE S. HOUSTON,

Appellee.

Appellant's Opening Brief

HENRY C. CLAUSEN,
FRANCIS V. KEESLING, JR., and
HENRY C. CLAUSEN, JR.

315 Montgomery Street
San Francisco 4, California

Attorneys for Appellant



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No. 15102

In the

United States Court of Appeals

For the Ninth Circuit

THE CANADA LIFE ASSURANCE COMPANY,
a corporation,

Appellant,

vs.

CHARLOTTE S. HOUSTON,

Appellee.

Appellant's Opening Brief

JURISDICTIONAL STATEMENT

This action to collect the proceeds on a life insurance policy was commenced against appellant in the Superior Court of the State of California in and for the County of Alameda (R. 6). Appellant petitioned for removal (R. 3), and the action was removed to the Court below pursuant to the provisions of Title 28, United States Code, §§ 1332, 1441, in that it is a civil action wherein the matter in controversy exceeds the sum or value of \$3,000.00 exclusive of interest and costs, and is between citizens of different states. The case was tried without a jury before Chief Judge Roche, whose Memorandum Opinion (R. 40) is reported at

137 F. Supp. 583. Judgment for plaintiff was filed February 8, 1956 (R. 79). A notice of appeal was filed March 6, 1956 (R. 80). The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

1. Preliminary

This is an appeal from the judgment awarding respondent the sum of \$28,552.00, together with interest thereon from May 4, 1954, to date of judgment in the sum of \$3,531.84 in an action to recover the proceeds of a life insurance policy. Appellant raised two defenses: suicide of the insured, and material misrepresentations of the insured in his application for the insurance respecting his drinking habits.

On September 24, 1953, at Lakeview, Oregon, the insured, William M. Houston, United States manager for three foreign insurance companies (R. 142), made written application to appellant The Canada Life Assurance Company for a \$10,000.00 life insurance policy with family income rider. The policy was payable, initially in installments or, in the alternative, in a lump sum commuted value at the election of the beneficiary (R. 133).

As part of the application, the insured made certain written representations in Part II thereof entitled "Statement of Health—Medical." Question 6 asked, "(a) To what extent do you use alcoholic stimulants?" to which Mr. Houston answered, "Yes, socially only occasionally," and "(b) Have you ever used them to excess?" to which Mr. Houston answered, "No." Mr. Houston subscribed to the above answers by averring that "The answers recorded above are as given by me and are complete and true." (R. 41, Deft's Ex. C.)

On November 3, 1953, the policy applied for issued. This provided in part as follows:

"Suicide. During the first two years from the date of issue of this policy, suicide (whether the assured be sane or insane) is a risk not assumed under this policy; should death occur in such manner that the assurance is not effective because of the operation of this provision, the Company will pay an amount equal to the premiums paid under this policy, which amount will be paid in one sum to the person or persons who would have been entitled to the net proceeds of this policy or the first payment therefrom had this policy matured by reason of the assured's death." (R. 133)

On February 22, 1954, the insured died of a gunshot wound self-inflicted in a remote corner of the basement of his Berkeley home. At the time of the fatal shot, the insured had been bent over about horizontal to the floor, a short carbine rifle positioned nearly vertical to the floor and ceiling its butt resting upon the floor and its muzzle within one inch of his chest and pointed at the heart area, his hands accessible to the trigger. There was only one cartridge in the gun.

Shortly after the insured's death, respondent, widow of the insured, contacted her counsel (R. 405), who then proceeded to collect evidence (R. 116) and to employ certain experts (R. 523). He prevailed upon the Coroner to hold an inquest so that the Coroner's conclusion on the manner of death might be changed (R. 625, 628). An inconclusive Coroner's verdict resulted, based upon these experts' testimony, the senior investigating police officer not having testified at the inquest, nor, of course, any witnesses of appellant (R. 619, Pl. Ex. 6).

On May 4, 1954, after the coroner's jury verdict, respondent submitted her proofs of death to appellant. Appellant's investigation thereupon uncovered evidence of suicide, including expert testimony, which the trial court below refused to admit. The trial court, however, permitted respondent to prove the coroner's verdict, the testimony of her experts, and other inadmissible evidence. Basing its conclusion on such inadmissible evidence, and in the face of uncontradicted facts of suicide, the Court concluded that appellant had not proved suicide, nor insurance fraud. This action of the trial court of disregarding uncontradicted evidence of physical facts of suicide, and excluding appellant's evidence and admitting respondent's, are the errors of which appellant principally complains. Other errors appear also in the following resume of the case.

2. Uncontradicted Evidence of Physical Facts

On the day of his death the insured slept until about 1:30 p.m. (R. 351). He was awakened by his wife, the respondent (R. 351). He drank a glass of tomato juice left by his wife by the stairway leading to the first floor of his home and proceeded down the stairs (R. 351, 353). He was wearing pajamas, a robe and slippers (R. 356). He was not wearing his eye glasses, although it was unusual for him to come downstairs to breakfast without wearing them (R. 438). His wife was expecting him to come down and eat breakfast (R. 409).

Instead, however, he went downstairs, stopped to talk to and kiss his daughter, and went down to the basement into a far corner. Within five or ten minutes of the time he awakened (R. 601) and a minute and a half after talking to his daughter (R. 407) he fatally shot himself (R. 407).

The place of the shooting, indicated by marks of blood and the gun, was in the center of a passageway at a remote corner of the basement where ammunition for the gun was stored (R. 107, 125-126). The deceased was a tall man and would have had to stoop slightly to enter this area (R. 612), but, of course, not parallel to the floor as was the case at the time of the shooting,—the height there being five feet eleven inches (R. 461).

The only bullet or shell in the gun was the one which was fired. There was none in the magazine (R. 124).

The gun itself was a .30 caliber lever action carbine (R. 112). At the time of the fatal shooting the gun was in an almost vertical position to the floor. From a dent in the floorboard to the bullet hole in the ceiling, a criminologist determined that the gun had been almost vertical—only a slight angle off the vertical, viz., 6 degrees (R. 517). The dent in the floorboard (Pl. Ex. 12) was 33rd of an inch deep (R. 499), and similar to recoil marks made when the gun was fired after the event by pulling the trigger while *resting* the gun butt on the floorboard (R. 511).

At the time of the shooting the decedent had bent his body over the gun until his fingers were accessible to squeeze or push down upon the trigger, and his chest-heart area was within an inch of the gun muzzle. The gun muzzle was three feet from the floor, which in turn was some five feet eleven inches from the ceiling. His torso had had to be a little bit more than horizontal to the floor (R. 517, 518).

The entry wound was a *powder-blasted* hole in decedent's chest at the heart area. The exit wound was smaller and at a point in the back lower down than the entry in front (R. 506).

The path of the bullet, as shown from the gun being thus positioned at a near vertical, the body bent over, the muzzle *within an inch* of the powder-blasted heart area of the chest, was through the body, out a smaller hole in the back and at a point lower down than the front entry wound, and up to a spot on the ceiling almost vertically overhead. This bullet path through the body was confirmed by x-rays. The nature of the wound and the short length of the gun (three feet) indicated that the decedent was bent over more than parallel to the floor (R. 506, 526-527, 530, 517).

The body was found about fifteen feet away from the gun, face downward, with both hands underneath the prone body (R. 111).

There was no evidence of any kind that the gun had made contact with any object other than the floor. The only evidence relevant to the question whether the firing had been by an accidental jarring of the gun against some object was the testimony of a gun expert in his description of the gun and passageway. He testified that the passageway was crowded with protruding furniture when he investigated the basement *two months after the accident* (R. 523, 524-525), but that even so one could walk through the passageway (R. 530). In any event, he testified that striking the butt of the rifle on its sides did not discharge the gun (R. 528).

There was no evidence of physical facts of any kind which might have indicated that the decedent had accidentally pushed down upon the trigger. The only relevant evidence was that the gun had a five-pound trigger pull (R. 527) and the piece of floorboard (Pl. Ex. 12) which contained a dent similar to recoil marks made when the gun was intentionally fired by pulling the trigger while resting the gun butt upon the floor section (R. 476). There was no evidence

of grease on deceased's hands nor of marks on the gun to have indicated that deceased's hands had slipped while leaning on the barrel. All witnesses who knew testified that the deceased was careful with guns (R. 411, 488). His habit was to keep his guns loaded, but with cartridges only in the magazine, not in the chamber (R. 485). The gun had a safety mechanism in good order (R. 528).

3. Inadmissible Evidence of Experiments and Opinions Derived Therefrom

Over appellant's objection and subject to appellant's motion to strike, which was denied (R. 507-510, 526, 52, 54), the trial court admitted respondent's evidence of certain experiments made with the fatal weapon by witnesses employed by respondent, and which tests were made outside the presence of the court and any representatives of appellant. Lowell W. Bradford, a criminologist, testified that he submitted the gun to certain tests and succeeded in causing the gun to fire while the hammer rested against the firing pin, once by dropping it upon the floor and by hitting the hammer spur with a hammer (R. 528-529). This was witnessed by another criminologist, Paul I. Kirk (R. 512).

These witnesses then gave their opinions as to alleged possibilities of accident (R. 514, 515, 529).

No foundation for such testimony was laid to show similarity of conditions. *The cartridges used in these tests were not similar, in that the powder and bullets had been removed* (R. 531).

There was no testimony as to the height from which the gun was dropped, nor was there testimony as to the force with which the gun was struck by the hammer or upon the floor. There was no testimony that the type of surface against which the gun was struck was similar to plaintiff's Exhibit 12.

Neither expert testified that it was possible timewise or otherwise for the deceased to have ended up in his slightly more than horizontal position after having dropped the gun with sufficient force or distance to have caused the gun to fire. No evidence of butt impressions was introduced showing similarity between the butt impressions made by intentionally pulling the trigger (R. 511, Pl. Ex. 12) and the impression caused by the firing when the gun was dropped. And no testimony was introduced showing that the gun had remained in the same condition between the date of death, February 22, and the date of the experiments, March 25.

4. Evidence, Admitted and Excluded, of Possible Motives, Drinking Habits, and the Deceased's State of Mind

Deceased, the United States manager for three foreign insurance companies, was about 50 years old, married to respondent, with two grown daughters (R. 337, 338). Although his salary was \$20,000.00 a year, he spent about the amount of money he made (R. 403). Successively for several years prior to his death, he had been borrowing upon his life insurance policies, owing at the time of his death some \$9,900.00 (R. 399-401). He also had incurred other debts and at the time of his death he had a \$3,481.00 current liability (R. 402).

IMMEDIATELY AFTER THE SHOOTING, RESPONDENT TOLD THE INVESTIGATING POLICE THAT THE DECEASED "HAD PERIODS OF DEPRESSION AT TIMES," (R. 114). MRS. HOUSTON SAID AT FIRST THAT HE HAS PERIODS OF DEPRESSION AND WAS DEPRESSED LATELY," (R. 49). SHE ALSO TOLD POLICE THAT HER HUSBAND HAD NOT PLANNED ON DOING ANY SHOOTING OR GOING ON A HUNTING TRIP (R. 114).

Appellant's investigation of the death turned to Lakeview, Oregon, where evidence was adduced as to possible hidden motives for feelings of remorse and suicide, and also evidence of misrepresentation in the application for insurance.

It appeared that in October 1953 the deceased had been involved in an automobile accident with his company-owned Cadillac (R. 145). The accident happened while he was en route between Lakeview, Oregon, and Northern California, the deceased having intended to go across the state line (R. 146). The deceased told one witness from Lakeview three versions of the accident: One that he was alone, one that he was with a Mr. Irby and a girl, and one that he was just with the girl. The girl was a prostitute with purple hair (R. 184). Deceased paid her \$1,000.00 cash the evening after the accident (R. 255-256).

The morning after the accident deceased telephoned his Claims Superintendent, Paul Youngers (R. 147). On orders of the deceased, Youngers was to "take care of" the collision damage to the automobile, which was self-insured by New Zealand Insurance Company (R. 145-146). Jointly, Youngers and the liability carrier delegated the investigation to an adjuster, Van Doren, in Klamath Falls (R. 147). Van Doren's report (R. 237-246) was stricken from evidence on respondent's motion to strike (R. 247-248).

Thereafter, on November 9, 1953, when deceased was in San Francisco, the prostitute involved in the accident wrote him, calling him "Bill," complaining that he was avoiding her and asking for a "loan" (R. 578-579, Def. Ex. K). He turned the letter over to his attorney, who dictated a reply signed by deceased's secretary (R. 579-580).

Shortly after the above accident, deceased had purchased in Lakeview on his own initiative a new Cadillac. For this he received a letter from his home office in New Zealand, stating in part. "I am aware of the circumstances which necessitated the replacement of your car and would have appreciated the opportunity of considering this matter before the new purchase was actually completed" (R. 168).

The association of drinking with the Oregon accident, as appears from the excluded report of Van Doren, led to further disclosures respecting the deceased's drinking habits while in Lakeview. One witness testified that deceased was under the influence of alcohol a great deal of the time when he visited Lakeview without his wife (R. 257). He would have as many as eight highballs (R. 254) and would drink in the morning (R. 251). A waitress in a Lakeview cafe testified that she had on occasion seen deceased in the cafe, that he had appeared to have had considerable amount to drink, that he acted overbearing and unruly, would try to serve himself, just take over, acted like a "big shot" and was intoxicated (R. 213-214). On one of these latter occasions he was wearing a coonskin cap (R. 214). One witness, Mrs. Virginia Wilkerson, who had known him and was a friend of his for about ten years (R. 249), testified that his nickname was "Wild Bill Hiccup" (R. 251).

Respondent's evidence consisted of testimony contrary to this evidence of drinking habits. There was testimony of moderate drinking, but no direct contradiction as to the drinking at precise times and places testified to by appellant's witnesses (R. 468, 567, 429). Respondent produced testimony to the effect that the deceased seemed unaffected by the facts set forth above which were suggestive of pos-

sible motive (R. 378, 177, 191). Respondent in effect disavowed her statement to the police that the deceased had had periods of depression (R. 408). As is usual in these cases, evidence of future plans (R. 553, 383) and satisfactory relations with employer (R. 551-552) and family (R. 338, 418, 442) was produced. Although deceased shortly before his death had appeared "*kind of mad, pre-occupied and bothered*" (R. 387) about an annual report to be filed in the states in which his companies did business and which required revision because of an error, the weekend before his death he did not appear different to his family or friends (R. 387, 419, 456, 548). And on the afternoon of his death, between the time he awoke and the time of the shot, he appeared to his wife and daughter congenial and happy (R. 351, 422).

More significant, however, was respondent's evidence descriptive of deceased's personality; to the layman deceased would appear quite unlikely to have committed suicide. He was an extrovert, friendly, dynamic, very, very vigorous (R. 381). "Q. Now, would you say that Mr. Houston was ordinarily a happy man who enjoyed life? A. He enjoyed it more than anybody I have ever met before or since." (R. 468). "Well, he was always a very cheery person. He always had something doing. He was always active . . ." (R. 564). "Mr. Houston was an extrovert. He was probably the least moody person that I know of. He was a very congenial, happy soul" (R. 196). In Lakeview, Oregon, he apparently was even more so. While his San Francisco friends and business associates testified that deceased would have anywhere from two to four drinks before lunch or dinner (R. 153-154, 169-170), according to witness Wilkerson when he was in Lakeview without his wife he would be under

the influence of alcohol a great deal of the time (R. 257). There was a marked difference in his behavior in San Francisco and Lakeview. "Here he was 'Wild Bill,' and there he was the manager for the New Zealand Insurance Company" (R. 254). This difference in behavior was called a "Jekyll and Hyde" transformation (R. 255). He exhibited there certain odd traits. He was hypochondriacal (R. 252), egotistical (R. 252), would monopolize conversations (R. 252); once had fired a gun in a real estate office (R. 252). He was selfish (R. 256), wasn't considerate of other people (R. 257), yet he was very interested in social work (R. 316). He acted in an exhilarated mood (R. 319). He liked a roaring good time (R. 257).

To appellant's expert medical witness, however, the above evidence would have been particularly significant. Dr. A. E. Bennett, professor of and practitioner of psychiatry for many years, who had made a special study of suicide and had written several papers dealing with suicidal tendencies (R. 290-291), who had treated many hundreds for suicidal tendencies as the major part of his practice (R. 292-293), described the suicide-prone cyclothymic personality. His testimony is uncontradicted. Such a person could be one who loves life, is happy at home and happy and successful in business (R. 293). They frequently are extremely successful businessmen (R. 298). They are extroverted, outgoing people (R. 298). The cyclothymic personality is an individual who is subject to mood swings, either elation or depression, that go beyond the normal (R. 293). Excessive mental strain or fatigue, or physical fatigue, while the individual is in the depressive phase, may cause him to take his own life (R. 294). Fifteen to twenty per cent of these cases end up as suicides (R. 304).

Appellant combined in a hypothetical question what was known of deceased's personality and behavior, his extroversion, his hypomanic Lakeview behavior, his seemingly normal San Francisco behavior, respondent's statement to the police that he had periods of depression and had lately been working hard and long hours and was under stress, and asked this medical expert on suicide whether the individual so described fell into one of the suicidal tendency types (R. 295-297). Respondent's objection to the question was sustained (R. 297, 298).

5. Exclusion of Evidence of Appellant's Underwriting Practice Respecting Drinking Habits

In support of its misrepresentation defense, appellant called its Assistant Secretary, who had been trained in underwriting and allied fields (R. 131). He testified that the appellant company, in issuing the policy sued upon, relied upon the representations and statements contained in the application therefor (R. 325). But, the trial court refused him permission to testify whether appellant would have issued its policy had it known of deceased's drinking habits (R. 327-329) and refused to permit him to testify what the company practice was at the time the policy was issued regarding an unfavorable personal history of drinking habits (R. 329).

6. Exclusion of Evidence of the Circumstances Surrounding the Making of the Coroner's Jury Verdict and of Opinion Evidence to Rebut the Verdict and the Opinions of Respondent's Experts

As stated before, respondent, over appellant's objection, put into evidence the Coroner's jury verdict (R. 330-331, 335) and the opinions of her experts as to whether the gun

could have been discharged either accidentally or intentionally (R. 529). But appellant's efforts to explain the circumstances surrounding the making of the verdict and to refute respondent's experts' opinions with the conclusions of its own experts were blocked by respondent's sustained objections. Appellant called the Alameda County Coroner, who, during his thirty years service had on numerous occasions per year investigated and reached conclusions as to suicidal deaths (R. 625). The court refused to allow the Coroner to testify as to his conclusion respecting the cause of death (R. 628, 625) and his reasons for not having called a Coroner's jury until prevailed upon by respondent's counsel (R. 628). Appellant also called the homicide inspector who had charge of the police investigation of the insured's death, but who did not testify at the inquest, Inspector Edwin F. Parker (R. 616). The court refused to allow him to give his conclusion as to the manner of death (R. 620). Appellant also called another policeman who had investigated insured's death, Patrolman Kenneth Pine (R. 601). And the court refused to allow him to give his conclusion as to the manner of death (R. 606, 607).

7. Findings and Judgment

The court found that the deceased did not die as a result of suicide but as a result of a gunshot wound accidentally inflicted (R. 76, 77), saying in its memorandum opinion, "If the court was of the view that the evidence presented spelled out but one conclusion, namely, suicide, it would not hesitate entering judgment for defendant herein," (R. 46). The court also held, "In the instant case there is nothing, either in insured's actions or statements, which would indicate suicidal intent or disposition," (R. 51). The court also found

(1) that the deceased did not know that any of the statements in the application were untrue, (2) that the deceased made no false representations in the application, (3) that his use of alcohol was not excessive nor unusual, (4) that his statements were not material misrepresentations (R. 75, 76). In fixing the amount of judgment including interest from May 4, 1954 (R. 79), the court found that the proofs of loss were filed with appellant on May 4, 1954 (R. 73), but nowhere found, nor was there evidence of, any election by plaintiff to take the full commuted value of the policy as of that date or any date.

SPECIFICATION OF ERRORS

1. The Trial Court Erred in Finding That the Insured Did Not Die as a Result of Suicide But as a Result of a Gunshot Wound Accidentally Inflicted.

This finding is erroneous for three reasons: *first*, it is based upon an erroneous theory as to appellant's burden of proof; *second*, in any event, the uncontradicted evidence of physical facts, and the evidence as a whole, is inconsistent with any reasonable hypothesis except suicide; *third*, there is no competent evidence whatsoever of physical facts to show that the fatal shot was accidentally discharged.

2. The Trial Court Committed Prejudicial Error in Admitting, and in Denying Appellant's Motion to Strike, the Testimony of Lowell Bradford and Dr. Kirk Regarding the Results of Gun-Firing Experiments and Their Opinions Derived Therefrom.

The grounds urged in appellant's motion to strike were "that said testimony was incompetent, irrelevant and immaterial, not a proper subject of expert testimony, and not conducted under circumstances similar to the death of deceased * * *" The grounds urged at the time of objection were: "Well, your Honor, we will object to that on the

ground that it would be evidence of a test by a ballistics expert which anybody could perform. There is no showing here that these various tests involve the way the gun was discharged at the time of the shooting * * * speculation * * *” (R. 507). “Q. Did you make any tests at all in connection with Mr. Kirk or by yourself to determine the manner in which that gun might be discharged, how the gun could be fired? Mr. Clausen: I just assume, your Honor, when my objection I said runs through the line, it includes any such testimony? The Court: Let the record so show” (R. 526).

The substance of Dr. Kirk’s line of testimony is as follows:

“Q. Now, did you examine the gun—that’s Defendant’s Exhibit B—to determine under what conditions that gun could be fired or discharged?

“A. Yes, I examined it in connection with Mr. Bradford. The two of us worked together on it at the time. We tested various possible ways of firing it, and examined the loading mechanism, and so forth” (R. 507).

“Q. Dr. Kirk, did you discharge this gun by dropping it?

“A. I witnessed the discharge of this weapon by striking it when the hammer was down on the firing pin. Mr. Bradford actually had the gun in his hand” (R. 512-513).

“Q. Now, as a result of your investigations with this gun, what in your opinion, would be the different ways in which that gun could be discharged?

“A. Well, certainly it could be fired in the normal manner, it could be cocked and the trigger could be pulled. It could be fired if the hammer is on the firing pin; it could be fired by striking the butt. It could perhaps, though I did not see this reproduced, nor did I reproduce it, be fired by a snapping action between the half-cocked position and the fully-down position;

that is, there was always an indentation placed in the primer of this gun under those circumstances, but it was normally not deep enough to fire. It could happen, however. The most probable ways, of course, are methods which would involve the cocking of a loaded gun and some mechanism whereby the trigger is pulled. That is, either by the finger intentionally or by other methods" (R. 512-513).

"Q. In your opinion, Dr. Kirk, assuming a man six feet one and a half or two inches tall, and in that location where the hole was cut and where the gun was discharged, and assuming that he was bent over, as he would be required to be because of the height of that ceiling, which was less than his height, and assuming that he had reached into the corner to get that gun and had turned around and reached over to close that mechanism, in your opinion, could that mechanism have been—the gun have been discharged?

"A. Yes, it is my opinion that could very definitely have happened." (R. 514-515).

The substance of Lowell Bradford's testimony is as follows:

"Q. And will you state what the results of your tests were?

"A. The first test that I made was a test on the trigger pull, using a trigger pull gauge. I found that the gun did not always discharge at the same trigger pull, and the range of variation was from four and a half to five pounds. It would always fire with five pounds pull; sometimes it required as little as four and a half pounds. The second test was to determine the effectiveness of the safety mechanism, if any. And there is only one safety mechanism on this gun, which is known as the half-cocked position. Shall I demonstrate that?" (R. 527).

“Q. Yes, do you want the gun?

“A. Yes, please. The firing pin has three possible positions. One is when it is fully retracted in the firing position; the second when it is let down carefully in what is known as the half-cocked position. In that position the firing pin does not lie on the—the hammer does not lie on the firing pin; there is a space between. The third position is the position following firing when the hammer is directly on the pin. And that position can be reached by quickly letting down the hammer—as the trigger is pulled, letting down the hammer with the thumb past the half-cocked position. This half-cocked position is what I referred to as the safety position. It appears to be in good order, that being the only safety mechanism. The other tests that I made had to do with being able to dislodge the hammer from the cocked position by striking first on the left side with a hammer, then on the right side, then on the bottom, then on the top, and then by jarring the butt. And I found that the hammer in the fully-cocked position would not dislodge from any one of those positions with a blow. The next test was to place in the chamber of the barrel a round ammunition from which had been removed the bullet and the powder, the detonating cap or primer still being in the cartridge case. The hammer was let down by using the combination of releasing the trigger with the thumb on the hammer, was let down past the half-cocked position, so that the hammer rested upon the firing pin. At that point the hammer spur was struck a light blow with a hammer and the round in the barrel discharged. The next test that was made was to place a round of ammunition in the chamber, again with the bullet and powder removed, with the primer cap still intact in the cartridge. The hammer was again let down past the half-cocked position to the firing pin, and the rifle was dropped on the floor butt first in this manner (illustrating). And upon one of

those occasions the round discharged in the barrel. I think that is the extent of the tests except that I examined it generally for mechanical condition and I found that there was a tendency for the latch mechanism of the lever to open rather easily if any vibration or jar was applied to the gun, so that it was easy to place it in a position to open" (R. 527-529).

"Q. And anyone moving over to close it would be leaning over the gun in a stooping position; is that correct?

"A. It would be necessary to stoop to reach it, yes."

"Q. Then, as I understand your testimony, Mr. Bradford, this gun could be discharged either accidentally or intentionally; is that correct?

"A. Yes, that is correct." (R. 529).

3. The Trial Court Committed Prejudicial Error in Excluding from Evidence the Written Report of the Adjuster, Van Doren, Regarding the Oregon Automobile Accident.

The grounds of objection urged by respondent were that this report was "incompetent, irrelevant, immaterial, no bearing upon any issue in this case, that it is hearsay as to Mr. Houston and the plaintiff in this case, and the statements in there are wholly self-serving declarations and not binding in any way upon the plaintiff or upon Mr. Houston and it is not shown—it is positively to the contrary that Mr. Houston did not see this report or did he ever have any conversation with anyone about the report after the things was or at the time of being prepared." (R. 247-248).

The substance of this report follows.

"Gentlemen: This will confirm telephone assignment on this case from Mr. Paul Youngers of New Zealand Insurance Company, and furnish report of my activities in accordance with this assignment.

"Mr. Youngers was unable to make contact with me until approximately five P.M. on October 20th. I was

asked to immediately make a trip to Lakeview to contact Mr. William M. Houston, United States Manager for New Zealand Insurance Company, who was in Lakeview, and had been involved in an accident while driving a Cadillac sedan owned by New Zealand Insurance Company. I was able to make telephone contact immediately with Mr. Houston and arranged to meet him at Hunter's Motel in Lakeview at 10:30 p.m. that night.

"This accident occurred sometime after midnight in the early morning hours of October 19, 1953. The definite time was not established, although it was probably between 1:30 and 2:00 A.M. Mr. Houston had been in Lakeview for some time, staying at one of his ranches, and he had invited Mr. Alton F. Irby, Jr., of A. F. Irby & Company, 40 Pryor Street, S. W., Atlanta, Georgia, to visit him and enjoy some bird hunting. Mr. Houston and Mr. Irby had come into the bar of the Hunter's Motel at approximately 11:30 P.M. on Sunday night, October 18th, where they met. allegedly for the first time, Vivian P. Chipman. They became acquainted and had one drink at this bar. The bar closes at twelve, and apparently this association of the three people proved to be mutually congenial and stimulated the mutual desire on the part of all three for further comradeship and association. It was then decided that the three of them would drive to Alturas, California, which is approximately 56 miles from Lakeview, where they could attend a dance and would find bars open until 2:00 A.M. The three of them then started out in the Cadillac sedan for Alturas, and after traveling about 45 miles and getting to a point within 11 miles north of Alturas, they met with an accident.

"This accident occurred in an area known as Chimney Rocks, and at a point where a new highway is being constructed, and apparently the accident took place right at the junction of the new highway with the old highway. The section of new highway at this

point is not completed and is barricaded off. The new highway is on a graded roadbed higher than the old highway. Mr. Houston, who admits he was traveling 60 to 65 miles an hour, was confronted with several deer crossing the highway directly in front of him. He tried to avoid hitting the deer by swerving to his left and trying to get onto the new highway roadbed. He hit the flimsy barricade and apparently swerved out of control * * *

* * * * *

"We have a situation here of two prominent business men being involved in an accident causing injuries to a very attractive young lady, of rather doubtful character and background, under circumstances not entirely complimentary to Mr. Houston and Mr. Irby. There was the background of drinking and some possibility of successful prosecution of just claim against Mr. Houston and the New Zealand Insurance Company.

"Vivian P. Chipman is 26 years of age, resides at 8635 Trojan Street, Novarro, California. She claims to be a divorcee, having secured a divorce approximately six months ago from Dale Chipman in Los Angeles * * Mrs. Chipman claims to be a bar girl * * *

"She was taken to W. P. Wilbur, M. D., for examination. X-rays were taken of her chest and it was determined by Dr. Wilbur that she was suffering a separation of the sternum, and she had a hematoma on the low back region just about the left hip. She was somewhat dazed and confused from the impact of the accident, although I don't believe there was a history of unconsciousness to indicate concussion of any degree. The doctor wanted to hospitalize her at the Lakeview Hospital, but she refused to submit to this treatment, feeling she would be better off in a motel room at Hunter's Motel. Mr. Houston and Mr. Irby were very solicitous for her welfare and did everything possible to provide for her comfort, probably going somewhat beyond the bounds of ordinary

care and attention that one generally finds in a situation following an accident.

"There is some element of mystery as to why this woman, with her very obvious background, would be in an isolated rural community such as Lakeview. She claims to have been in the area for approximately a month, and on the expressed reason of being there for rest and solitude, which, of course, she could find in abundance in that area. It was claimed by all three persons that the meeting at the bar at Hunter's Motel just prior to the accident was the first time these three people had become acquainted.

"There is every indication that this was the type of case that immediate settlement should be attempted before this claimant got back to her home environment and under the more direct influence of her well-wishers and friends. This situation was recognized by Mr. Houston and Mr. Irby and they set the stage for this treatment of the case. Apparently Mrs. Chipman's mother had been to Lakeview, expecting to pick up Mrs. Chipman and drive her back to Los Angeles, but the doctor advised against such a long automobile trip, and so the mother had left without the daughter. I didn't meet the woman, but it was reported that she was rather domineering, and obviously very anxious to get the daughter back under her control, and into the hands of some attorney so that the case would be prosecuted to the fullest extent.

"Some Jewish boyfriend in Oakland had called Mrs. Chipman long distance and given her explicit instructions that she was not to sign any papers of any kind, and to leave her case open until she got back to Oakland. She apparently had arrangements made with this individual to stay at his home after she got into Oakland on her return from Lakeview. It is reported that this individual's name was Izzy Cantrovich. I am satisfied that this situation existed because Mrs. Chipman confided in me after the settlement was com-

pleted that this man had called her and told her these things, and that also one or two girlfriends had called her up to congratulate her on the fine position she had attained, and to speculate with her as to how much money she could collect.

"Mr. Houston had expected that I would arrive with a large amount of cash so that a settlement could be consummated immediately, and a tender of actual cash made rather than a draft or a promise of a settlement draft. I was not prepared to handle the case in this manner. Mr. Houston then got busy and wrote personal checks securing all the available cash he could dig up in Lakeview at that hour of the night. He finally came up with \$800 in currency.

"After being armed with this currency, the writer and Mr. Houston then called on Mrs. Chipman where she was confined to her room. This was approximately 11:30 p.m. It was my impression after visting with the woman for a few minutes that she was somewhat overawed, confused and apprehensive. I felt under the circumstances a soft approach would be more effective, and every attempt was made to visit with her and gain her confidence. Mr. Houston felt it would take \$1200 to settle the claim, based on the fact that the doctor told her she couldn't work for two months, and he had computed eight weeks' loss of wages at \$150 a week to arrive at this \$1200 figure. I gained the impression that he perhaps had, through his previous contacts with this lady, intimated in some way that she would receive that amount of money in settlement, exclusive of her hospital expense. I secured the attached signed statement from her before talking settlement. After some discussion we were able to secure her signature to the attached release for \$1,050 * * *

* * * * *

"We have a rather complex situation here in that the statement secured from Mrs. Chipman completely

exonerates Mr. Houston, and would seem to indicate there is no basis for substantiating any claim under the guest law for California.

"Mrs. Chipman's attitude at the time of our contact was one of complete understanding and cooperation. She expressed many times she had no desire or intention of making any trouble for Mr. Houston. On the other hand, we had a young lady whose whole background and appearance suggested a person of loose morals, and whose attitude toward employment and the opposite sex was most definitely unconventional. The contacts from her circle of friends and natural environment indicated that after she returned to her home she would be subject to unusual pressure to attempt to capitalize on this accident. This lady is somewhat childlike in her mental processes, and degree of intelligence, and there is a very good chance that her attitude could be changed by this influence and pressure from her well-wisher friends. We felt that in view of all these circumstances involved, it would be better to have a release executed by her immediately."

* * * * *

4. The Trial Court Committed Prejudicial Error in Sustaining Respondent's Objection to the Hypothetical Question Put to Dr. A. E. Bennett.

Respondent's grounds of objection were that "it is compound, unintelligible, assumes facts not in evidence, calls for the conclusion of this witness which is not subject to expert testimony, that there is no showing that this doctor ever examined Mr. Houston, and upon the ground it is not proper examination" (R. 297).

The question asked follows.

"Q. Now, doctor, assume a person about 50 years old married, with two grown daughters, United States

manager of a foreign insurance company, the salary about \$20,000 a year, several known pressing debts, accustomed to having alcoholic drinks before lunch and dinner, he is the productive go-getter type, occasionally traveled, on production trips, getting out to meetings and getting business on these occasions, would also occasionally have alcoholic drinks; while in San Francisco engaged in his activities he is reserved and quiet, refined, although of a friendly, gregarious, extrovert nature, but in Lakeview, Oregon, while on vacation, on hunting trips, without his wife, usually he is in an exhilarated mood; the difference in his demeanor from the San Francisco conduct may be described as a 'Jekyll and Hyde' transformation. While in Oregon he dresses in cowboy clothes. On occasion, for example, wears a coonskin cap. He acts rather overbearing, unruly; for example, tried to serve himself in a restaurant, 'just takes over,' acted in the parlance of the street as a 'big shot.' Monopolizes conversations, been inconsiderate of other people, likes a roaring good time, has been a fast driver, egotistical, yet interested in social work, takes pills and has a cure for everything, has been concerned about his health. On one occasion, for example, fired a rifle in his host's real estate office. Has gone under the nickname of 'Wild Bill Hiccup.' He would be under the influence of alcohol part of the time. On occasion would begin drinking in the morning, have drinks during the day; accustomed to having drinks during the day. Before his death he was involved in an automobile accident with a woman passenger, whom he demonstrated anxiety to get hurriedly paid, who was paid some thousand dollars, who is rumored to have written him since. His wife, at the time of the policy investigation of his death, February 22, 1954, reported to the police substantially that he had periods of depression and recently had been depressed, shortly before his death. His death occurred by gunshot wound through the left

breast, the carbine, the muzzle of the carbine pressed against or right close to his breast while leaning over parallel to the floor; his arm able to reach to the trigger of the carbine so that the body is parallel to the floor and the bullet goes up to the ceiling straight up from where the gun was pointing, and this was shortly after he arose at about one-thirty in the afternoon following a dinner party which had lasted until about eleven-thirty the night before, at which party he had some drinks, one or two or more drinks. At the time of his death he is dressed in his sleeping clothes and the shooting occurred in a lower remote corner of the basement of his Berkeley home. Now, from my description and assumptions here, Doctor, will you tell me whether that individual falls into one of the suicidal types?"

5. The Trial Court Committed Prejudicial Error in Excluding Evidence of the Circumstances Surrounding the Making of the Coroner's Jury Verdict, and of Opinion Evidence to Rebut the Verdict and the Opinions of Respondent's Experts.

The grounds urged by respondent were that the opinions of the jury and Coroner were "incompetent, immaterial, irrelevant, not within any issue in this case, calls for opinion or so-called expert testimony without having established the qualification, * * * that the question whether a death is due to accident or suicide, under all the cases * * * is not subject to opinion or expert testimony" (R. 607, 619, 625).

The substance of the excluded testimony of Officer Pine appears in Deft. Exhibit L:

"In my opinion, the victim took the gun from a place of storage other than in the outer basement section, went to the far corner of the outer basement section, secured the shell from the paper bag, loaded the gun, bent over it and pulled the trigger."

The substance of the excluded testimony of Inspector Parker presumably would have been the same as his report, part of Defendant's Exhibit J:

"While no suicide notes were found and no reason is apparent at this time for his committing suicide, the very nature of the wound is such that it would be highly improbable that it was an accidental one * * *"

The questions asked of the Coroner, Bungarz, were as follows:

"Q. And did you tell Mr. Angell that you had reached a conclusion yourself at that time?

"Q. And did you tell Mr. Angell the reasons why you had reached the conclusion you had reached?

"Q. Was there any testimony given at the inquest which in any manner changed your original impression?" (R. 628-629).

6. The Trial Court Erred in Finding That the Deceased Made No False Representations in the Application for Insurance, That the Deceased Did Not Know That Any of the Statements Therein Were Untrue, That His Use of Alcohol Was Not Excessive Nor Unusual, and That His Statements Were Not Material Misrepresentations.

This finding is erroneous because it is contrary to uncontradicted evidence of excessive drinking, because the questions asked in the application do not call for the opinions of the applicant, but for the facts and because as a matter of law the statements therein are material representations.

7. The Trial Court Committed Prejudicial Error in Excluding Evidence of Appellant's Underwriting Practices Respecting Drinking Habits, and Whether Appellant, in the Light of Such Practices and With the Knowledge of Deceased's Drinking Habits, Would Have Issued the Policy Sued Upon.

Respondent's objections to this evidence were based on the grounds that it was "incompetent, irrelevant, and imma-

terial, calling for the conclusion of this witness, asking for opinion testimony, which opinion testimony is not admissible * * * (R. 327-328-329).

The questions asked of appellant's Assistant Secretary were as follows:

"Q. All right. And if the company had had that information, in the light of your experience and practice, with the company, would the company have issued its policy of insurance?"

The stricken answer was:

"A. It wouldn't" (R. 327).

"Q. What is the company practice—what was the company practice at the time this policy was issued, Mr. Wainwright, with regard to an unfavorable personal history of drinking habits?" (R. 329).

8. The Trial Court Erred in Concluding That Interest Was Due from May 4, 1954, Upon the Amount of Commuted Value.

This conclusion of the trial court is erroneous in that there was no finding or evidence that respondent gave notice to appellant on May 4, 1954, or any other time of her election to take the commuted value of the policy.

SUMMARY OF THE ARGUMENT

1. The judgment should be reversed, because, as appears from the trial court's memorandum opinion, the judgment below was based upon an erroneous legal theory respecting appellant's burden of proof. Under the case law, appellant was not required to establish but "one conclusion, namely, suicide" but rather merely the reasonable conclusion of suicide. Nor, under the case law, was appellant required to prove the precise reason why deceased took his life or to disprove completely any and all fanciful theories of accident which were not based upon some competent evidence of physical facts.

2. Judgment should be directed for appellant, because the cases so hold where, as here, the uncontradicted evidence of physical facts is consistent with a theory of suicide but is inconsistent with a theory of accident. Under such case law, it was respondent's burden to support any proffered theory of accident with competent evidence of physical facts, but no such evidence was produced. The evidence of insured's happy homelife and surroundings has been held not inconsistent with suicide, which holding is supported by expert testimony below. Assuming that respondent's evidence that the rifle could have been discharged by striking the butt or hammer spur was competent evidence, there is no evidence of physical facts to show that the rifle was thus discharged, although respondent had the opportunity and used it to attempt to collect evidence against suicide. Rather, the evidence of physical facts is consistent with a theory of suicide and is inconsistent with any theory of accident, and even though no possible motives were proved (although they were), the cases hold that in such case the defense of suicide is proved as a matter of law.

3. The judgment should be reversed, because the trial court erred prejudicially in ruling on evidence on the issue of suicide. The court should have sustained appellant's objection and should have struck the testimony of respondent's ballistics experts, because (1) respondent failed to lay a proper foundation for her evidence of experiments, inasmuch as respondent failed to prove that the gun had remained in the same condition from the date of the death to the date of the experiments, and respondent failed to prove that the cartridges used were similar, that the type of surface against which the butt was struck was similar, that it was possible, from the amount of speed or force by which they succeeded in having the gun discharge for the deceased

to have so discharged the rifle and have ended up in his known position; because (2) the evidence proved nothing, no evidence having been produced that the gun had remained in the same condition from the date of death to the date of the experiments—it was incompetent, irrelevant and immaterial; because (3) under the case law the opinions of the experts as to possibilities of accident were not the proper subject of expert testimony and were not based upon competent evidence in the case.

The trial court should have sustained appellant's objection to the introduction of the Coroner's certificate and jury verdict for irrelevancy, there having been no issue as to date of death or submission of proofs of loss. But having so admitted them, the court, in accordance with case law, should have allowed appellant to explain and rebut the opinions contained therein, and in the testimony of respondent's experts, by the testimony of the Coroner, and the police, experts in the determination of suicide.

The court erred in excluding the adjuster's report of the Oregon automobile accident, since it was made by him as a result of his agency relationship with deceased and within the scope of his authority.

The court erred in refusing to allow appellant's expert medical witness to evaluate the evidence respecting deceased personality to determine whether or not his personality was of a suicidal type. Similar evidence has been admitted in other cases, and should be, because it requires the special study and training possessed by appellant's expert witness, and also because it rebutted such of respondent's evidence as led the trial court, erroneously, to say that "in the instant case there is nothing, either in insured's actions or statements, which would indicate suicidal intent or disposition."

4. The judgment should be reversed, because appellant's evidence of deceased's drinking habits showed he made material misrepresentations in his insurance application. In any event, the judgment should be reversed because the trial court erred in excluding testimony to the effect that appellant would not have issued its policy had it known of deceased's drinking habits, and testimony of insurance practices respecting an unfavorable history of drinking habits. Both these items of evidence are admissible under California law and decisions directly in point. No substantial evidence, therefore, supports the trial court's findings that deceased made no material misrepresentations in his application.

5. Finally, the judgment awarding interest on the commuted value from May 4, 1954, to date of judgment is erroneous, inasmuch as respondent proved no notice of election to take such amount as of said date. Interest as damages is allowable only where the right thereto is vested as of a day certain. Since the appellant's obligation under the policy was initially to pay installments or, in the alternative, to pay the commuted value,—and respondent gave no notice of election between them, under the provisions of Cal. Civ. Code § 1449 her right to choose between them was waived, and absent such notice of election, there is no proof as to the date upon which her right to interest vested.

ARGUMENT**I.**

THE UNCONTRADICTED EVIDENCE OF PHYSICAL FACTS IS CONCLUSIVE PROOF OF SUICIDE. APPELLANT THUS SUSTAINED ITS BURDEN OF PROOF AT THE TRIAL LEVEL, AND UNDER THE LAW APPELLANT WAS NOT REQUIRED TO GO FURTHER AND PROVE THE PRECISE REASON FOR THE SUICIDE OR TO ELIMINATE ANY POSSIBLE THEORY OF ACCIDENT. TO COMPEL APPELLANT, AS DID THE TRIAL COURT, TO SHOULDER SUCH AN IMPOSSIBLE TASK IS CLEARLY ERROR, AND ITS FINDINGS OF ACCIDENTAL DEATH, BASED UPON THE CLAIMED FAILURE OF APPELLANT TO PROVE THE PRECISE MOTIVE AND DISPROVE SUCH OTHER THEORIES, ARE CLEARLY ERRONEOUS AND SHOULD NOT BE SUSTAINED.

As indicated by its memorandum opinion the trial court felt that appellant failed to sustain its burden of proof for failure to disprove respondent's fanciful suggestions of accident (R. 46) and failure to establish "suicidal motive" (R. 52). The court would have found for appellant, apparently, only if "the evidence presented spelled out but one conclusion, namely, suicide" (R. 46). Thus the trial court's whole approach to the case began on an erroneous angle. For it was not appellant's burden to produce evidence which spelled out but "one" conclusion, nor was its burden to establish suicidal motive or to completely disprove fanciful suggestions of accident. Appellant's burden was merely to produce evidence which would lead reasonably to the conclusion that the deceased committed suicide, regardless of any other theories that might be posed by the evidence.

As the California Supreme Court said in *Long v. Cal.-Western States Life Ins. Co.*, 43 Cal. 2d 871, 82:8 "There was no error in the instructions to the jury as to the pertinent suicide provisions of the insurance policies, and that if the jury found 'by a preponderance of the evidence' and was

satisfied from the evidence that the deceased committed suicide, the finding must be for defendant."

Proof of the suicidal motive is not a *sine qua non*. As the court said in *Beers v. California State Life Ins. Co.*, 87 C. A. 463, "* * * the proof of motive is not indispensable * * *" There, lack of proof of motive was relied upon by the appellate court in affirming a judgment for the beneficiary, yet the court also said, at page 457: "Undoubtedly the circumstances specially stressed by the defendant as involving conclusive proof of suicide are, as before we have said, indicative of a designed self-administered death, and it is to be conceded, as likewise has been stated, would afford sufficient support to the conclusion, had such been the result of the jury's deliberations, that the deceased committed suicide." (p. 457).

In fact, to compel defendant to prove the precise reason why deceased took his life would be a most unfair and unjust rule. Certainly an insurance man as deceased, who was bent on suicide, would not deliberately have left traces of motive, such as suicide notes, knowing that they would deprive his family of insurance monies. His actions would have been precisely the opposite. And, in any event, "It is * * * common knowledge that suicide is usually committed with as much secrecy as possible, and could be but rarely shown except by proof of the facts and circumstances attending its commission." *Brotherhood of Maintenance of Way Employees v. Page*, 123 S.W. 2d at 536. "Absence of an apparent motive to take one's life does not preclude a finding of suicide. In *Aetna Life Ins. Co. v. Tooley*, (16 Fed. 2d 244) cited by defendant, the court said, * * * it is not to be denied that successful business men, living in pleasant surroundings, do commit suicide * * *" *Knapczyk v. Metropolitan Life Ins. Co.*, 53 N.E. 2d 484.

As is more fully set forth below, appellant contends that the physical facts, and the evidence as a whole, can support only one reasonable hypothesis: suicide. A DEATH OCCURRING BY GUNSHOT WOUND THROUGH THE HEART AREA, WHILE BENT OVER HORIZONTAL TO THE FLOOR, WITH THE CHEST WITHIN ONE INCH OF AN UPRIGHT CARBINE, THE FINGERS ACCESSIBLE TO THE TRIGGER, AND WITH ONLY ONE CARTRIDGE IN THE GUN, CERTAINLY PRESENTS A THEORY OF SUICIDE.

And, contrary to the opinion of the trial court, this was all that appellant had to prove, even assuming, *arguendo*, that some other theory might be imagined. If there were some other theory, it became the duty of the trial court to pick between the theories; *not to do as the court below apparently did: to dismiss one merely because of the claimed existence of the other*. To illustrate the proper approach, see *Long v. Cal.-Western States Life Ins. Co.* 43 Cal. 2d 871, where the court said at page 877:

“The issue was thus sharply defined for the jury’s evaluation of the *physical evidence* in determining whether the bullet entered the forehead consistent with *plaintiff’s theory* of accidental death or entered at the temple consistent with *defendant’s theory* of suicide. The jury’s verdict for defendant establishes that it rejected plaintiff’s theory and accredited defendant’s theory * * *” (Emphasis added)

The trial court’s misapprehension of the law regarding the precise nature of appellant’s burden of proof below controlled its decision. The error requires reversal. The faulty determination of a factual case due to an erroneous legal theory requires a reversal. *Williams v. U. S.*, 76 S.Ct. 100; *Sachs v. Ewings*, 133 Fed. 2d 403.

II.

IN ANY EVENT, THE UNCONTRADICTED EVIDENCE OF PHYSICAL FACTS, AND THE EVIDENCE AS A WHOLE, IS INCONSISTENT WITH ANY REASONABLE THEORY EXCEPT SUICIDE. NO PROFFERED THEORY OF ACCIDENT HAS SUPPORT IN REASON OR COMPETENT EVIDENCE. THUS, REGARDLESS OF WHAT APPELLANT'S BURDEN OF PROOF MAY HAVE BEEN AT THE TRIAL LEVEL, THE FINDINGS OF ACCIDENT CAN NOT BE SUSTAINED.

A. It Was Respondent's Burden to Support Any Theory of Accident with Competent Evidence of Physical Facts Consistent with Accident and Inconsistent with Suicide.

Appellant contends that even with all the activity of respondent's counsel shortly after the death in hiring criminologists and attempting to collect evidence against suicide, no evidence whatsoever of physical facts was produced which would reasonably support any theory of accident. Respondent produced no evidence of scuff marks which would have indicated that the deceased slipped and fell. Respondent produced no evidence of microscopic examination of the gun or furniture near the place of shooting to show that the trigger had come in contact with any protruding furniture. Respondent did not produce a sample board showing butt indentations caused by the firing of the gun when struck upon the floor. Respondent produced no evidence of grease on the hands of the deceased to lend support to a theory that deceased's hands had slipped while holding the barrel of the gun (Dr. Kirk examined the body—R. 494).

Should *appellant* have cured these omissions? Should appellant have been required, when notified of the death long after the event, to collect such *negative* evidence? How competent would any testimony be, for example, to the effect

that months after the accident there were no scuff marks on the floor, thus indicating that the deceased had not slipped? But the law imposes no such impossible burden upon appellant. In a suicide defense case, just as in any other case, the determination of the question of fact of suicide is dependent upon evidence introduced, not speculation advanced. "A suicide case should be tried like any other case, and metaphysical reasoning about presumptions and burden of proof should not be permitted to obscure the real issue, as has been done in so many cases." *Richardson v. New York Life Ins. Co.*, 174 Fed. 2d 475. The rule is that appellant's burden of proof (even at the appellate level) "is met by *proof* that is *inconsistent* with any *reasonable* theory of death by accident or by the act of another." (Emphasis added.) *New York Life Ins. Co. v. Alman*, 22 Fed. 2d 98. Where the *physical facts* are consistent with the defense of suicide, but are not consistent with the respondent's theory of accident, the burden of proof for all practical purposes is upon the respondent to adduce actual physical evidence of accident. Mere theories advanced or possibilities argued by respondent which are not based on competent evidence of physical facts and which are inconsistent with uncontradicted *physical facts* will not suffice. The following cases illustrate or state this rule.

In *Aetna Life Ins. Co. v. Tooley*, 16 Fed. 2d 243, the facts were as follows. The insured was found dead in his automobile about noon, less than two blocks from his home. Skid-marks showed that the brakes had been applied for a distance of about 60 feet immediately before the car had stopped. The body was found leaning on the front seat, his head toward the right side, his left hand on the driving wheel,

his right hand under the body and the right foot on the brake. A pistol was found under his body. The pistol was of a single-action type, which could be cocked only by hand before firing. One freshly exploded cartridge was in the chamber. He was shot through the head, and powder burns indicated that the muzzle had been held against or within a few inches of the right temple. The beneficiary claimed that the pistol might have been discharged accidentally as the insured was taking the pistol out for the purpose of shooting a wild animal, that having seen the animal he immediately put on his brakes, reached for the pistol, which discharged accidentally by the hammer being first caught against the side of the pocket or some other object. The court said:

“But all this is mere conjecture. The car was stopped behind the cedar tree, where it could not be seen from the house. *The record contains no evidence indicating that there were wild animals in the vicinity*; but, even if there were, it would be a remarkable combination of circumstances that would cause Tooley’s accidental death in the manner in which it occurred. Assuming that the pistol had been left in the pocket of the automobile after a trip to the ranch or into the country, it was not self-cocking, but was of the type that had to be cocked by hand. *Of course, if the hammer had caught on some object and been suddenly jarred, it is possible that it might have been discharged. But at that distance the powder burns would have extended further away from the wound, or there would have been none at all.*

“Again, the bullet entered at one temple, and, after going straight through the head, came out at the other, as is usual in so many cases of suicide. That the wound would have been at the same place in the event of accidental discharge in the manner supposed is hardly possible * * * ” (page 245) (Emphasis added).

In a slightly different case, *Burkett v. New York Life Ins. Co.*, 56 Fed. 2d 105, the insured had died from a gunshot wound through the roof of his mouth into the brain. The gun, a rifle, contained one exploded shell and lay about three feet from the body, the butt towards the body. There were powder burns on the skin, and there was even testimony that the gun had gone off once accidentally when being set against something. The court said (page 108):

“There was no evidence having any tendency to prove that the gun was fired as a result of the hammer accidentally coming in contact with another object with sufficient force to produce that result. *That the firing was so caused is a mere possibility supported by nothing shown by the evidence.* The nature of the wound and the fact that blood and brains were found on the roof of the adjoining building show that, when the shot was fired, the insured must have been in a standing position, and that the gun was pointing upward, the muzzle of it being in close proximity to the part of the head which was blown off. Where the insured was when the fatal shot was fired, there was, *so far as any evidence indicated*, nothing except the pavement beneath him with which the hammer accidentally could come in contact with sufficient force to cause the firing. If in an accidental fall of the gun the hammer had struck the pavement with the result that the gun was fired it is not reasonably conceivable that the shot would have gone in the direction which the evidence showed it went. * * * The evidence was such that none of it had a substantial tendency to prove that the death was accidentally caused * * *” (Emphasis added).

In *Brotherhood of Maintenance of Way Employees v. Page*, *supra*, a case involving a pistol shot through the head, the court said:

“How, then, did the insured kill himself? Appellee makes this answer: ‘It is as reasonable to assume that

deceased was examining the pistol, when it was accidentally discharged, or that he was overcome by one of his falling spells (to which he was subject), and in attempting to steady himself by grabbing at the shelf on which the pistol lay, caused its accidental discharge, as to assume that he deliberately placed the gun to his head and took his own life.'

*"We do not think these theories can be accepted with any show of reason, or that they would be seriously considered, if this were not a controversy between a bereaved widow and an insurance company * * *"* (page 537).

"There is a presumption against suicide or death by any other unlawful act, and this presumption arises even where it is shown by proof that death was self-inflicted. It is presumed to have been accidental until the contrary is made to appear.' But no case has ever held that this presumption was conclusive and might not be overcome by testimony. Nor had any case ever held that the testimony must be that of eye witnesses. It is, on the contrary, a matter of common knowledge that suicide is usually committed with as much secrecy as possible, and would be but rarely shown except by proof of the facts and circumstances attending its commission." (page 538) (Emphasis added)

In this case a judgment for the beneficiary was reversed.

The above *Burkett* case and other like cases are cited by the California court in *Long v. Cal.-Western States Life Ins. Co.*, 43 Cal. 2d 871, 883; they state the California rule. And, to illustrate the converse situation, see *Wilkerson v. Standard Acc. Ins. Co.*, 180 Cal. 252, where findings against suicide were sustained because there was *some* competent evidence of physical facts to support a theory of accident. There the deceased died as a result of a pistol wound directly into the forehead. *But, there were no powder marks* (a fact incon-

sistent with suicide). The body was found prostrate in front of the washbowl in his hotel room. On the mirror above the bowl and the woodwork below it there was a smattering of blood and brain matter, and an expert testified that such a wound would spurt back blood. *On the bowl was a black mark, as if some kind of hard object had fallen, chipping and discoloring the surface* (a fact consistent with a theory of accident). A small drawer below the mirror had been known to contain the deceased's revolver and shaving materials. A leather holster still lay in the drawer. No motive for suicide was shown or attempted to be shown. The court held that it was not inconceivable that he had been standing erect, with his head inclined toward the bowl, had accidentally dropped the weapon, which discharged, and by reflex of the body the blood spurted from a higher place than from where the shot was fired. The court said "it is possible that, had we been sitting as the jury in this case, we should have come to a different conclusion from that which the jury did arrive * * *" (p. 255-256), but, noting the above evidence of accident, affirmed the judgment on the verdict.

Compare the case at bar with the *Wilkerson* case. *Here there were powder marks.* Here there is no evidence whatsoever to show that the gun had fallen, had been jarred, or that an open latch mechanism had to be closed.

B. Respondent Proved No Facts Inconsistent with Suicide and Consistent with Accident.

Giving all possible credit to respondent's evidence, even to the inadmissible testimony of her experts, it is obvious that there is no substantial basis for any finding of accident. That evidence, reduced to essentials, is that the deceased gave no indication to family or friends of suicidal intent or tendency, and that a month after the death the rifle was dis-

charged once on repeated attempts at striking the butt on the floor, or by hitting the hammer spur with a hammer, with some unknown force. But, neither of these two assumed facts suffice.

The former has been judicially held not to be a fact inconsistent with suicide. In the *Burkett* case, *supra*, cited in the *Long* case, the court said, "The fact that the insured's situation and surroundings were such as to make it seem to others unlikely that his worries about his physical condition would make him wish to take his own life was not inconsistent with the existence of the suicidal intent." As the court said in *Walker v. Phila. Life Ins. Co.*, 127 F. Supp. 26 at page 30:

"Plaintiff counsel content themselves with referring to certain bizarre facts, and admittedly there are several, such as the deceased's naturally jovial disposition, his light and good humor the night before, his having mapped out plans and itineraries for the next few days with his son, his taking a shower and shaving, and packing his bag just before the shot was heard, and leaving his bedroom open, but the fact remains—the evidence shows that his death was not accidental."

The holdings of these courts are supported by the uncontradicted testimony of Dr. Bennett, expert on suicides. He testified as follows:

"Q. Now, Doctor, in the particular type of—I believe you called it cyclothymic personality—would such a type of personality include one who was a successful businessman?

"A. Yes, they frequently are extremely successful.

"Q. Would such a personality include a person who would be happy at home?

"A. Would be happy at home?

"Q. Yes. Have a happy home life and—apparently a happy home life.

"A. Oh, yes, that's—

"Q. And would such a personality include also one who would apparently during the moments of exhilaration love life?

"A. Yes, they are very extroverted, outgoing people" (R. 298).

And since this testimony is uncontradicted and unimpeached, it could not and cannot be arbitrarily rejected. "Testimony which is not inherently improbable and is not impeached or contradicted by other evidence must be accepted as true by the trier of fact * * *" *Dobson v. Dobson*, 86 C.A. 2d 13, 14.

The *Burkett* case, *supra*, is also helpful respecting the testimony of possible ways of firing the rifle other than the obvious way of pulling the trigger. Such evidence would be of facts inconsistent with suicide and consistent with accident, *only if there were some evidence of physical facts from which it could be inferred that the rifle actually had fired in the manners described*. Mere possibilities, without some connecting link with actualities, do not suffice. "That the firing was so caused is a mere possibility supported by nothing shown by the evidence." *Burkett v. New York Life Ins. Co.*, 56 Fed. 2d 105, 108. Note again that the evidence disclosed nothing other than that the rifle had come in contact with the floor (as in the *Burkett* case). Respondent produced no evidence of butt impressions made by striking the floor with the rifle. And, "if in an accidental fall of the gun the hammer had struck the pavement with the result that the gun was fired it is not reasonably conceivable that the shot would have gone in the direction which the evidence showed it went * * *" *Burkett* case, p. 108.

C. Since the Evidence of Physical Facts, and the Evidence as a Whole, Is Inconsistent with Accident But Is Consistent with Suicide, Appellant Proved Its Defense as a Matter of Law.

The trial court held, "In the instant case there is nothing, either in insured's actions or statements which would indicate suicidal intent or disposition" (R. 51). This, of course, is to ignore completely Dr. Bennett's uncontradicted and unimpeached testimony and appellant's other evidence on motive. For the trial court so to dismiss the statements of a renowned medical expert, specially trained by study, teaching and practice in the subject of suicide and suicidal tendencies is glaring error and illustrative of the court's misconception regarding the nature of proof of "motive" in suicide cases. *The* motive need not be proved; *possible* motives suffice.

The evidence as a whole discloses several possible "motives" traditionally relied on by the courts. The evidence respecting deceased's personality, the admission that deceased suffered periods of depression, suffices as a "motive." *Burkett v. New York Life Ins. Co.*, 56 Fed. 2d 105; *McClelland v. Great Southern Life Ins. Co.*, 220 S.W. 2d 515. Fear of disclosure of an indiscretion with a woman is a "motive." *New York Life Ins. Co. v. Alman*, 22 Fed 2d 98. And, of course, running debts may be a "motive."

But all this makes no difference. Even if it be assumed that no evidence of motive or suicidal tendency was presented by appellant, the absence is not a fact inconsistent with suicide. *Knapczyk v. Metropolitan Life Ins. Co.*, 53 N.E. 2d 484; *Aetna Life Ins. Co. v. Tooley*, 16 Fed. 2d 244; *Burkett v. New York Life Ins. Co.*, 56 Fed. 2d 107.

The important point is that the physical facts themselves are consistent only with suicide and are inconsistent with accident. There was no reason other than suicide for de-

ceased to go down to the basement and get a gun, dressed as he was, and at a time when he was expected to eat the breakfast his wife was preparing in the kitchen upstairs. He was not dressed to do anything normal with a gun. He was not planning any hunting trips nor planning to do any shooting of any kind. The gun and ammunition were in the remote portion of the basement where the gun was fired. The deliberate intent to go there and get a gun and ammunition was plain. He did not say anything to his wife or daughter as to his purpose, even though he passed them on route downstairs. He stooped over the gun and put the muzzle within an inch of his powder-blasted chest so as to hit the heart area. There was only one shell in the gun, that being the shot that killed him. The dent in the wood floor was caused by the recoil where the gun rested, not by a fall. The muzzle was so close to the chest of the deceased as to make blast powder burns on the chest-heart area. The gun was found near the ammunition. The gun was of such short length that a person of deceased's size bent on suicide would bend over deliberately and point the muzzle to his heart to cause the powder marks. The firing took place in the center of the passageway at which point there were marks of blood. He walked or crawled about fifteen feet away where the body was prone with his hands under him. He was an experienced hunter, with a record of careful handling of guns and as such was acquainted with the lethal characteristics of a gun. He was accustomed to using such a weapon for killing.

Did the deceased fall over the rifle? Appellant submits it is beyond all reason to speculate that a fall would have placed him directly over and within one inch of the rifle

muzzle, with a rifle standing upright by itself (!) his body bent more than parallel to the floor, the muzzle of the rifle pointed at his heart. "Where a person trips, the normal movement is to throw out the hands to break the impending fall." *Long v. Cal.-Western States Life Ins. Co.*, 43 Cal. 2d 871. That, of course, would have caused the deceased's gun and his hands to fly away from his body, rather than position them to do a certain self killing. As the court said in *New York Life Ins. Co. v. Alman*, 22 Fed. 2d 98: respecting a similar wound: "The possibility of death by accident is excluded by the nature and location of the wound."

Did the deceased lean down to close the latch mechanism and in the process push the trigger? Did the deceased lean down to close the latch mechanism and in the process push the trigger? There was no proof that this was done. No man, it can be assumed, would do so. Place and point the muzzle within an inch from his heart. Did deceased, having leaned down and having closed the mechanism, squeeze the trigger unintentionally? This again would be a completely fanciful and unproved suggestion. The lever action was found closed, and the trigger was therefore protected by the trigger guard. In any event, it is impossible to imagine a hunter accustomed to handling guns ever placing himself in such a position in order to close a lever action. A man experienced in handling guns would instinctively have canted the rifle up with his left hand and with his right hand pull the lever mechanism closed in the normal manner with the muzzle pointing away from him. Furthermore, any attempt to close the lever mechanism by bending over the rifle would have tilted deceased's shoulders or his hips, or both, in such a manner as to have placed his chest at an angle to the muzzle of the rifle, rather than directly over it. And finally, if the deceased had bent down to close the lever ac-

tion his hands would have been up and away from trigger, since the lever action was nearer the muzzle than was the trigger.

Did the trigger catch on some object? No, since the indentation of the butt resting upon the floor proved the shot occurred in the center of a clear passageway. Furthermore, there was no evidence that the rifle had come into contact with any object other than the floor, where it made a mark similar to ones caused by resting the rifle on the floor and intentionally pulling the trigger.

There are an infinite number of other equally untenable possibilities, some of them ridiculous. But, like respondent's theories, they are not supported by any evidence. Thus, the round in the chamber might have been defective and fired automatically. But the evidence is that the deceased kept his guns loaded with cartridges in the magazine, not in the chamber. Again, some foreign matter may have come flying through the air to hit the trigger. But no such missile was produced as evidence. As with all *ex post facto* determinations of fact, where there are no eye witnesses, no probabilities other than possibilities. And, in view of the evidence of physical facts, the only probable way in which the rifle was fired was the usual way, the way 999.99% of rifles are fired, by pulling or pushing the trigger. And when a rifle containing only one round is fired with a muzzle within one inch of the heart area of the chest, while the body and the rifle are in the position where the trigger might be most conveniently pulled or pushed and where it is extremely unlikely the body and rifle would have been if the deceased fell or slipped, the only reasonable hypothesis is suicide.

This being so, appellant was and is now entitled to judgment. Where the undisputed physical facts are inconsistent with a theory of accident but are consistent with suicide,

the defense of suicide is proved as a matter of law. *New York Life Ins. Co. v. Alman*, 22 Fed. 2d 98; *Aetna Life Ins. Co. v. Tooley*, 16 Fed. 2d 243; *Burkett v. New York Life Ins. Co.*, 56 Fed. 2d 105; *New York Life Ins. Co. v. Anderson*, 66 Fed. 2d 705; *Planter's Bank of Tunica, Miss. v. New York Life Ins. Co.*, 11 Fed. 2d 602; *New York Life Ins. Co. v. Weaver*, 8 Fed. 2d 680; *New York Life Ins. Co.*, 56 Fed. 2d 105; *Richardson v. New York Life Ins. Co.*, 174 Fed. 2d 475; *Brotherhood of Maintenance of Way Employees v. Page*, 123 S.W. 2d 536; *Industrial Mutual Indemnity Co. v. Watt*, 130 S.W. 532; *New York Life Ins. Co. v. Watters*, 243 S.W. 831; *McMillan v. General American Life Ins. Co.*, 9 S.E. 2d 562; *McDaniel v. Metropolitan Life Ins. Co.*, 195 S.E. 597; *New York Life Ins. Co.*, 53 N.E. 2d 484; *Mutual Benef. v. Denton*, 124 S.W. 2d 278; *McClelland v. Great Southern Life Ins. Co.*, 220 S.W. 2d 515.

III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING AND IN DENYING APPELLANT'S MOTION TO STRIKE THE TESTIMONY OF LOWELL BRADFORD AND DR. KIRK REGARDING THE RESULTS OF GUN-FIRING EXPERIMENTS AND THEIR OPINIONS DERIVED THEREFROM.

Although the trial court self-servedly said: "The court must first state that it would reach exactly the same decision in this case whether this evidence was presented or not" (R. 52), it is apparent from respondent's arguments below and from other statements of the trial court that the admission of the testimony of Bradford and Kirk was highly prejudicial. For example, the trial court also stated, "Defendant's counsel relies heavily on the position of insured's body and gun to establish suicide. Admitting for the sake of argument that these factors are consistent with suicide, there is nothing else to support a suicide theory. It is un-

controverted that the gun could have been fired accidentally in one of several ways * * *” (R. 49). Appellant, however, contends that there is no competent evidence to show that the gun could have been fired by any way other than squeezing or pushing down upon the trigger.

A. Respondent Failed to Lay a Proper Foundation for Her Evidence of Experiments. There Is No Proof That the Tests Were Made Under Conditions and Circumstances Which Were Essentially the Same as Those Which Existed When the Death Occurred. Respondent Thus Failed to Meet Her Burden of Proof, and Consequently the Evidence Was Inadmissible.

Before the testimony of Dr. Kirk and Bradford regarding their gun-firing tests could become admissible, if at all, it was incumbent on respondent to show the facts surrounding the experiment and to show that the circumstances were substantially similar with those existing at the time of the accident. *McGough v. Hendrickson*, 58 C.A. 2d 60; 18 Cal. Jur. 2d 678, Evidence § 205—Experimental Evidence and Tests. This she completely failed to do.

There was no evidence that the gun had remained in the same condition. On the date of death, February 22, it passed into the hands of the Deputy Coroner (R. 112). Then from him to the police, to Dr. Kirk, and then to Lowell Bradford a month after the death (R. 501). The presumption of unchanged condition does not operate retroactively. See *Bergen v. Tulare County Power Co.*, 173 Cal. 709, 716.

The cartridges used were not similar, since *the bullet and powder had been removed*. Obviously their removal might make a vast difference in results.

There was no testimony that the type of surface against which the butt was struck was similar to the floor in deceased's basement, Plaintiff's Exhibit 12.

There was no testimony as to the height from which the gun was dropped nor as to the amount of force or speed with which the gun was struck by the hammer or upon the floor.

Neither expert testified that it was possible timewise or otherwise for the deceased to have ended up in his slightly more than horizontal position after having dropped the gun with sufficient force or distance or speed to have caused the gun to fire.

No evidence of butt impressions was introduced showing similarity between the butt impressions made by intentionally pulling the trigger (Pl's Ex. 12, R. 511), and the impression caused by the firing when the gun was dropped.

The improper purpose of the experts' testimony, of course, was to attempt to prove the possibility of accident. But gun-firing experiments to prove or disprove theories of accidents, if admissible at all, require strict conformance to the rule that conditions and circumstances be substantially similar. The tests should be correlated with the position of the body. *People v. Wagner*, 29 C.A. 363. The court there said at pp. 368-369:

"Evidence of an experiment whereby to test the truth of testimony that a certain thing occurred is not admissible where the conditions attending the alleged occurrence and the experiments are not shown to be similar. *The similarity of circumstances and conditions goes to the admissibility of the evidence* and must be determined by the court. * * * Evidence of this kind should be received with caution, and only be admitted when it is obvious to the court from the nature of the experiments that the jury will be enlightened rather than confused. *In many circumstances a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful rather than helpful.*" (Emphasis added.)

B. Furthermore, the Failure of Respondent to Prove That the Rifle at the Time of the Tests Was in the Same Condition as It Was at the Time of Death, Makes the Ballistics Evidence Irrelevant, Incompetent and Immaterial.

The most that can be said for respondent's evidence respecting ballistics tests is that it proved that the rifle could be fired once after several attempts so to do by striking the butt or hammer spur on the day the tests were made, March 25, 1954. In order to raise the inference that it was in the same condition on February 22, 1954, some evidence was required to show that its condition had remained unchanged since that date. There was no such evidence. It, therefore, proved nothing material or relevant to the case. See *Waterman v. Liederman*, 16 C.A. 2d 483, 486.

C. In Any Event, the Opinion Testimony of the Respondent's Experts Was Clearly Inadmissible.

The trial court permitted Dr. Kirk to give his opinion that it could "very definitely have happened" that the deceased killed himself while leaning over to close the lever action mechanism, or by dropping the rifle (R. 515). Like testimony was given by Lowell Bradford (R. 529). This testimony is so clearly inadmissible as to leave little room for argument. First, the testimony is not the proper subject of expert opinion. Second, it is not based on any competent evidence in the case; the lever action mechanism was found closed and the butt impressions on Plaintiff's Exhibit 12 were made when the gun was intentionally fired while the butt *rested* (not slammed) upon the floor.

As the court said in *Long v. Cal.-Western States Life Ins. Co.*, 43 Cal. 2d 871, 882, regarding similar testimony:

"The court's ruling excluding such testimony was correct. This is not a situation comparable to the opinion of a qualified physician relative to the means which might have been employed to produce a given injury, a subject on which he would have peculiar knowledge by rea-

son of experience and study * * * Experiments which can be made without special knowledge or training and which are largely based upon speculation or conjecture are not properly the subject of expert testimony."

Whether a firearm could have been accidentally discharged, where the position of the wound and the course taken by the bullet are known, is not the proper subject of expert testimony. *People v. Heacock*, 10 C.A. 450; 19 *Cal Jur* 2d 95, Evidence § 367—Ballistics.

What makes the error of admitting respondent's evidence even more grievous, however, is the action of the court in refusing appellant permission to rebut it.

IV.

IT WAS PREJUDICIAL ERROR FOR THE TRIAL COURT TO PERMIT RESPONDENT TO PUT INTO EVIDENCE THE INADMISSIBLE CORONER'S JURY VERDICT AND YET PREVENT APPELLANT FROM REBUTTING OR EXPLAINING THE CIRCUMSTANCES SURROUNDING THE VERDICT OR FROM REBUTTING WITH OPINION EVIDENCE OF ITS OWN. THE OPINIONS THEREIN OR THE OPINIONS OF RESPONDENT'S WITNESSES.

There was no issue at the trial as to the deceased's death or date of death, or submission of proofs of loss. Yet, over appellant's objection, respondent put in evidence the death certificate and verdict of the Coroner's jury (R. 333, 335). The latter recites: "This jury is unable to decide from the evidence whether this is suicidal or accidental." (R. 333). Such purported evidence was not only irrelevant to any issue in the case but proved nothing at all; it was immaterial. Of course, had the Coroner been permitted by respondent's counsel to issue his death certificate without a Coroner's jury, his certificate would have been proper evidence for appellant. *Bryson v. Manhart*, 11 C.A. 2d 691. It would have been *prima facie* evidence of the facts stated therein. But no facts were stated in Plaintiff's Exhibits 5 or 6, and

they could have been of no possible legitimate use in the case.

It is obvious why respondent offered these documents. Since they were based upon the testimony of respondent's experts, marshalled by adversary counsel immediately after the shooting, they lent some vague credence to their opinion evidence adduced at the time of trial.

But since this was done, appellant certainly had the right to explain the circumstances surrounding the making of the verdict and the right to rebut the opinions impliedly impressed in the verdict and in respondent's so-called expert testimony. As the court said in *Pacific Freight Lines v. I.A.C.*, 26 Cal. 2d 234, 238-239:

"Assuming the admissibility of the death certificate and that it constituted 'prima facie evidence of the facts therein stated * * * ' *it was subject to rebuttal and explanation.* (*Estate of Scott*, 55 Cal. App. 2d 780, 782-783 [131 P. 2d 613].) On its face the certificate purported to state nothing as to the cause of the accident except the opinion or conclusion of the Coroner's jury. Such opinion or conclusion had no foundation in fact when correlated with the transcript of the evidence produced at the Coroner's inquest. It should be accorded no greater force than opinions or conclusions of a witness or an expert, the sufficiency of which depends upon whether facts or reasons are given in support thereof * * * " (Emphasis added.)

"Although the introduction of incompetent evidence by one party does not justify the offer of similar evidence by the other, evidence otherwise incompetent may be admissible in rebuttal or explanation of evidence introduced by the adverse party." 18 *Cal Jur* 2d 572-573; Evidence § 129.

Appellant therefore contends that the opinions of those whose experience and practice most often brought them into

contact with suicides or the determination thereof, namely, the police investigators and the Coroner, should have been admitted. This in all fairness should have been done to rebut the opinions expressed or implied in the testimony of respondent's witnesses or Coroner's jury verdict. The reasons for the opinions of the Coroner and police would have been especially enlightening; no doubt they would coincide with appellant's.

The rule allowing rebuttal of an adversary's evidence extends to opinion evidence. *People v. Loop*, 127 C.A. 2d 786, 801-802.

V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ERRO-NEOUSLY EXCLUDING APPELLANT'S EVIDENCE OF MOTIVE AND SUICIDAL TENDENCIES AND THEN HOLDING THAT THERE WAS NO EVIDENCE OF SUICIDAL INTENT OR DISPOSITION.

In a suicide defense case, the widest possible latitude of proof is permitted. Evidence of acts, conduct and statements of the deceased are admissible to show the deceased's state of mind and the motives with which he acted. *Fidelity Mutual Life Assn. v. Miller*, 92 Fed. 63. In *Bertschinger v. New York Life Ins. Co.*, 166 Oregon 307, 111 Pacific 2d 1016 the Court held it to be the rule that where suicide *vel non* is the issue and only circumstantial evidence is available, wide latitude should be accorded the parties in the admission of facts and circumstances which may shed light upon the state of mind of the alleged suicide or establish a motive for self-destruction. In the case at bar this rule apparently worked only for the advantage of the respondent. Two highly pertinent items of appellant's evidence were excluded, thus enabling the trial court to make its self-serving statement that "in the instant case there is nothing, either in in-

sured's actions or statements, which would indicate suicidal intent or disposition" (R. 51). That statement is flagrantly wrong.

A. The Agent's Report, Made by the Adjuster Within the Scope of His Authority as Delegated from the Deceased to the Deceased's Claims Manager to the Adjuster, Was Admissible Evidence, the Exclusion of Which Was Highly Prejudicial.

Revealing evidence of the deceased's actions and reactions to his unfortunate involvement in the Oregon automobile accident was made available by J. A. Van Doren, the adjuster appointed by Paul Youngers, the deceased's claims supervisor. The haste with which the individual was paid, the expectation of deceased that the adjuster would come armed with sufficient money to make an immediate cash settlement, the deceased's personal supervision of the paying of the money and the making of a release, all are a complete refutation to the attempt of respondent to deprecate the importance of the Oregon accident to deceased's state of mind. Relevancy of the evidence is strengthened by the fact that, as the report shows, the woman involved was quite likely to capitalize on her "fine position," and did, in fact, at a later time attempt to secure more money from the deceased (R. 578-579). Furthermore, the more respondent piled up evidence complimentary to deceased, the worse the Oregon incident became.

Ordinarily a written description of the scene in Hunter's Motel at Lakeview, Oregon, the night after the accident would be inadmissible hearsay. But, California Code of Civil Procedure, § 1870, provides that "* * * evidence may be given upon a trial of the following facts: *5. After proof of * * * agency, the act or declaration of a partner or agent of the party, within the scope of the * * * agency, and during its existence."

Appellant contends that the agency relationship between the deceased and the adjuster, Van Doren, was proved by the testimony of Paul Youngers, the deceased's Casualty Superintendent. His duties included litigating claims and the adjustment of claims (R. 142). The deceased telephoned Mr. Youngers, reported the accident to him, and asked him to take care of the insurance features arising out of the accident (R. 145). Youngers thereupon delegated the duty to the adjuster (R. 147). There was no question of the authenticity of the report inasmuch as the regional superintendent of New Zealand's liability carrier testified that the report was part of the file kept in the ordinary course of business of the liability carrier (R. 205-207).

In line with the provisions of California Code of Civil Procedure § 1870 (5), it therefore has been held that an adjuster's report is such a declaration of an agent as to be admissible in evidence against the adjuster's principal. *Guberman v. Weiner Consolidated Hotels, Inc.*, 10 C.A. 2d 401. And in accordance with the rule permitting a wide latitude of proof, such admissible evidence should have been received below.

B. The Trial Court Committed Prejudicial Error in Excluding Expert Testimony Regarding the Deceased's Suicidal Disposition.

The rule permitting such a wide latitude of proof in a suicide case is based upon the fact that "it is * * * common knowledge that suicide is usually committed with as much secrecy as possible * * *" *Brotherhood of Maintenance of Way Employees v. Page*, 123 S.W. 2d 536. The courts, therefore, search far and wide for possible motives or "reasons" for deaths obviously caused by suicide.

Hence, in more recent years, as scientific knowledge has become more certain respecting personality traits and clas-

sification of emotional and personality disorders, the courts have recognized that the determination of whether an individual possesses suicidal tendencies was a question more aptly put to a medical specialist in the field, rather than solely to a trial judge presumably not versed in the specialty. Thus in *Smith v. Metropolitan Life Insurance Co.*, 47 N.E. 2d 330, and in *McClelland v. Great Southern Life Ins. Co.*, 220 S.W. 2d 515, expert testimony was admitted for the purpose of showing that the insureds in those cases, due to emotional and personality factors, possessed suicidal dispositions and tendencies.

Because respondent's evidence of the deceased's personality would tend to appear to the layman to be non-suicidal, appellant sought expert opinion testimony from an expert in the field, Dr. A. E. Bennett, for two reasons: (1) to secure his opinion evaluating respondent's evidence to the effect that the deceased "loved life," was an extrovert, happily married, in good health, cheerful on the afternoon of his death, and (2) to secure his evaluation of the deceased's hypomanic behavior in Lakeview, Oregon, and its relation to his behavior in San Francisco. Appellant contends that his evaluation of these facts should have been most helpful to the trial judge.

Admissibility of expert testimony is judged by determining whether the testimony would add instruction to facts already in evidence. "The opinion of an expert should be received if it adds instruction to that which the jury is able to obtain from the data before it." *Blinkinsop v. Weber*, 85 C.A. 2d 276, 283. This is especially true in the case at bar. Obviously the answer to the question, "Why does a man commit suicide?" can best be answered by one specially trained and educated in the subject of suicidal types and suicidal states of mind. And where evidence is presented to

the layman which would make it appear that the deceased would not commit suicide, but where in fact to the expert such evidence would show he was of the type who would, then the expert opinion becomes not only helpful but necessary to a proper and unbiased determination of the issue.

The court so held in *Smith v. Metropolitan Life Ins. Co.*, 47 N.E. 2d 330 at 333:

“The offer of proof included a statement by Dr. Brown that the attacks of depression were typical in every respect of those seen in the depressed phase of manic-depressive psychosis, and his opinion that a patient so afflicted has a tendency to commit suicide. The court sustained plaintiff’s objection to the offer, and the question presented is whether the court erred in this behalf and whether upon a retrial of the cause, testimony of that character should be admitted.

* * * * *

“We think the proffered testimony was relevant to the issue on trial. The evidence as to Smith’s death was entirely circumstantial. In order to negative suicide and establish death by accidental means, plaintiff was permitted to adduce evidence that he was in good health, happily married, cheerful on the morning of his death, and that he attended his business during part of that forenoon. Taken with evidence of certain physical facts attending insured’s death, Dr. Brown’s testimony was offered to negative and rebut the circumstances tending to show death by accidental means, and to show subjective ailments as a basis for suicidal intent. Where the defense is death by self-destruction, the authorities hold that a reasonable latitude should be allowed in establishing that defense.

“In *Falkinburg v. Prudential Ins. Co. of America*, 132 Neb. 831, 273 N.W. 478, 480, suicide was the controverted issue. The insured died February 28, 1935, from a gunshot wound. The trial court excluded the testimony of two physicians who had examined the insured

prior to his death. The purpose of the testimony was to show his physical and mental condition in August, October and December, 1934, when he was examined by the physicians whose testimony was proffered. The insurance company offered to prove by one, a specialist in mental and nervous diseases, that there were indications of brain tumor and mental deterioration; the other physician found that on December 10, 1934, the insured was apprehensive, worried, easily excited, nervous and suffering from a 'manic-depressive psychosis, a form of melancholia,' accompanied by an agitated mental state in which he was much worried, exhibited fear and lost his sense of proportion. In reversing the judgment for plaintiff on the ground that the trial court erred in excluding the testimony offered, the court said that " 'Where circumstantial evidence is the only evidence available to a party, and the action must be determined upon the relative strength of probabilities and inferences, great latitude is allowed the parties in the adduction and admission of evidence.' " 2 Jones, Commentaries on Evidence (2d Ed.) § 604. The more the jury can know of the surrounding facts and circumstances, the better their judgment is likely to be. The physical and mental health of the insured is a surrounding circumstance which is relevant in this case, and the testimony on this matter was unduly restricted.'

"In *Bertschinger v. New York Life Ins. Co.*, 166 Or. 307, 111 P.2d 1016, it was held to be the rule that where suicide vel non is the issue and only circumstantial evidence is available, a wide latitude should be accorded the parties in the admission of facts and circumstances which may shed light upon the state of mind of the alleged suicide or establish a motive for self-destruction. In *Prudential Ins. Co. v. Morris*, 3 Cir., 72 F.2d 824, the court held that 'Any facts making it probable that his death (the insured's) was the result of suicide are relevant. Along with the other facts surrounding his death, causes which would impel him to take his own life are evidential, indicating a motive, and therefore

admissible.' In *Sees v. Massachusetts Bonding & Ins. Co.*, 243 App. Div. 400, 277 N.Y.S. 198, 202, which involved death by monoxide asphyxiation, the court said: 'In a case of this character, where the intention of the insured is in and of itself a distinct and material fact to be ascertained by a chain of circumstances, there should be a liberal opportunity afforded for introducing any evidence which would throw light upon the issue. Facts such as declarations, acts, and disposition tending to show an intent or motive for suicide are relevant and admissible.' (Citing cases.) In *Cady v. Fidelity & Casualty Co.*, 134 Wis. 322, 113 N.W. 967, 17 L.R.A.N.S. 260, it was held that evidence of the state of health of an insured person for a considerable period of time prior to his death, where it is claimed he died by suicide, is proper as bearing on whether the deceased came to his death as the result of suicidal intent."

VI.

THE FINDINGS ON MISREPRESENTATION ARE CONTRARY TO THE EVIDENCE. THE DECEASED'S MISREPRESENTATIONS IN THE INSURANCE APPLICATION RESPECTING HIS DRINKING HABITS ENTITLE APPELLANT TO RESCIND THE CONTRACT OF INSURANCE.

The court below held that the deceased's statements in his insurance application were mere expressions of his opinion (R. 42) and found that no misrepresentation, nor any material misrepresentation had been made by him (R. 75-76).

But it is difficult to see how such a finding could be made in view of the evidence in this case. The evidence is undisputed that Houston habitually used alcoholic stimulants, and at times used them to excess. At business lunches he would have several highballs. A good friend of the insured, Mrs. Virginia Wilkerson, admitted that on his trips to Lakeview, Oregon, when he was without his wife, Houston was under the influence of alcohol a great deal of the time. He

would have as many as eight highballs. He would begin drinking in the mornings and would drink during the day. The witness, Mrs. Jean Pierson, testified that she saw him on several occasions intoxicated early in the morning, being unruly and obnoxious. Bear in mind, also, that Mrs. Wilkerson was a witness hostile to us, an admitted friend of the deceased. Houston's drinking record in Oregon earned him the nickname, "Wild Bill Hiccup."

The question before the court is whether Houston truthfully revealed to the insurance company his drinking habits. Is the above evidence of drinking consistent with a representation that the individual drank only "occasionally" and *never* drank to excess? The California court has answered this question:

"If you find from the evidence that the deceased was in the habit of using wine, spirits or malt liquors and that had persisted for some time and that he had on more than one occasion used them to excess, then you should find that the representations herein are false."

McEwin v. New York Life Ins. Co., 42 Cal. App. 133, 143.

Furthermore,

"In the present case, it was the condition and history, not the insured's opinion respecting it, which should have been disclosed."

Telford v. New York Life Ins. Co., 9 C.2d 103, 108 (1937).

The effect of such a false representation is set forth in the California Insurance Statutes:

"Sec. 331. A representation is false when the facts fail to correspond with the assertion or stipulation.

"Sec. 359. If a representation is false in a material point, the insured party is entitled to rescind the contract from the date the representation becomes false."

These statutes are rigidly enforced. In *Telford v. New York Life Ins. Co.*, 9 Cal. 2d 103, the court said:

“A false representation or a concealment of fact, whether intentional or unintentional, which is material to the risk vitiates the policy. The presence of an intention to deceive is not essential.”

And the purpose of these rules is rather obvious:

“An insurance company is entitled to determine for itself what risks it will accept and therefore to know all the facts relative to the applicant's physical condition. It has the right to select those whom it will insure and to rely on him who would be insured for such information as it desires as a basis for a determination to the end that a wise discrimination may be exercised in selecting its risks.”

Robinson v. Occidental Life Ins. Co., 131 Cal. App. 2d, 581, 586.

There can be no question of the materiality of Houston's representations. “It has been held that answers to written questions set forth in application forms relative to insurance are generally *deemed* material representations * * *” *California-Western States Life Ins. Co. v. Feinsten*, 15 Cal. 2d 413, 423. The parties to the contract, by putting and answering specific questions, have made the matters covered by such questions material.

Insurance Code Sec. 334;

Pierre v. Metropolitan Life Ins. Co., 22 Cal. App. 2d 346;

California-Western States Life Ins. Co. v. Feinsten, 15 Cal. 2d 413;

Parrish v. Acacia Mutual Life Ins. Co., 92 F. Supp. 300;

Wilson v. Maryland Cas. Co., 19 Cal. App. 2d 463;

Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734;
McEwen v. New York Life, 23 Cal. App. 694;
McEwen v. New York Life, 42 Cal. App. 133;
Maggini v. West Coast Life, 136 Cal. App. 472;
 14 Cal. Jur. 502, 636.

VII.

IN ANY EVENT, IT WAS ERROR FOR THE TRIAL COURT TO EXCLUDE EVIDENCE OF APPELLANT'S PRACTICES OF UNDERWRITING RESPECTING AN UNFAVORABLE HISTORY OF DRINKING HABITS.

As is the case with its findings against suicide, the trial court's findings against misrepresentation in the application rest upon rulings excluding pertinent evidence. In fact, the trial court's rulings on evidence of materiality of the representations left the record devoid of any evidence on that issue. The finding follows from this error. But the rulings on evidence were wrong.

Cal. Ins. Code § 334 provides that the materiality of facts concealed (and misrepresented) depends upon their influence *upon appellant* in accepting or rejecting its risks:

“Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries.”

It obviously therefore is proper to put to a qualified representative of appellant the question whether the policy sued upon would have been issued appellant under present underwriting practices if it had known deceased's history of drinking habits. The sustaining of respondent's objection to this question (R. 327) runs directly contrary to California authority. *Allstate Ins. Co. v. Miller*, 96 C.A. 2d 778; 781;

Maggini v. West Coast Life Ins. Co., 136 C.A. 472, 476, hold that the answer "no" to such a type of question supports a finding that the representations were material.

The trial court went further, however, and refused to hear evidence of insurance practices respecting drinking habits (R. 329). This ruling completely foreclosed appellant's evidence on the point and was patently prejudicial. As the California court has said:

"Appellants also contend that the court erred in its rulings on the admissibility of evidence presented by insurance experts on behalf of the respondent insurer. This court finds no error in that regard. The questions propounded to those witnesses did not call for an opinion on the question whether the undisclosed facts here in issue were material to the risk. The witnesses were merely asked relative to a usage or custom in the matter of rejecting a risk had the companies been apprised of the facts such as here were concealed."

Cal. West. States Etc. Co. v. Feinsten, 15 Cal. 2d 413, 424.

VIII.

THE TRIAL COURT ERRED IN ASSESSING INTEREST AGAINST APPELLANT FROM MAY 4, 1954. THERE IS NO EVIDENCE AND NO FINDING TO THE EFFECT THAT RESPONDENT GAVE NOTICE TO APPELLANT OF ANY ELECTION TO TAKE THE FULL COMMUTED VALUE OF THE POLICY AS OF THAT DATE OR ANY DATE.

Under its contract of insurance, appellant was subject to two alternative obligations in case the policy ever became operative. One was to pay initially a monthly family income for the period provided for at the end of which the principal amount became due, or to pay the commuted value as of the date of death (R. 61). The trial court in awarding judgment gave judgment for the commuted value plus interest from the date proofs of loss were submitted to the date of judg-

ment. Appellant contends that this award of interest was erroneous.

California Civil Code § 3287 provides that interest as damages is recoverable only from the day upon which the right vests. As the California Supreme Court has said:

“Where there is no express contract covering the matter, the law awards interest on money from the time it becomes due and payable if such time is certain or can be made certain by calculation. (Civ. Code, §§ 3287, 3302; *Pitzer v. Wedel* [1946], 73 Cal. App. 2d 86, 92-93 [165 P.2d 971]; 14 Cal. Jur., Interest, § 5, p. 678). In the absence of a showing as to such time, and in the absence of a demand for interest, there is no occasion to award it * * *”

Budget Finance Plan v. Sav-On Food Club, 44 Cal. 2d 565, (FN, p. 572).

Respondent failed to give notice to appellant that she elected to take the commuted value of the policy. Hence, no right to interest on that amount vested in her as of May 4, 1954, as held by the trial judge. Cal. Civ. Code § 1449 provides:

“If the party having the right to selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose, or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party.”

The amount of such interest assessed against appellant on the total amount of said commuted value to date of judgment is \$3,531.84, a sum so substantial as to warrant redress in this Court, in case appellant is otherwise unsuccessful.

CONCLUSION

Since the record is replete with so many varieties of errors, there are at least three solutions in this Court.

FIRST, the judgment should be reversed with directions to enter judgment for appellant, since (1) the uncontradicted evidence of physical facts is inconsistent with a theory of accidental death but is consistent with a theory of suicide, and (2) there is uncontradicted evidence of material misrepresentations in the application for insurance.

SECOND, the judgment should be reversed at least for a new trial, the decision below having been based upon an erroneous legal theory respecting appellant's burden of proof and upon prejudicially erroneous rulings on the admission and exclusion of evidence.

THIRD, in any event and failing a complete reversal, the portion of the judgment respecting interest should be reversed for lack of evidence or a finding on any election of respondent to take the commuted value as of the date from which interest was assessed.

Respectfully submitted,

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No. 15,102

IN THE

United States Court of Appeals
For the Ninth Circuit

THE CANADA LIFE ASSURANCE COMPANY,
a corporation,

Appellant,

VS.

CHARLOTTE S. HOUSTON,

Appellee.

APPELLEE'S BRIEF.

PHILIP H. ANGELL,

ROBERT M. ADAMS, JR.,

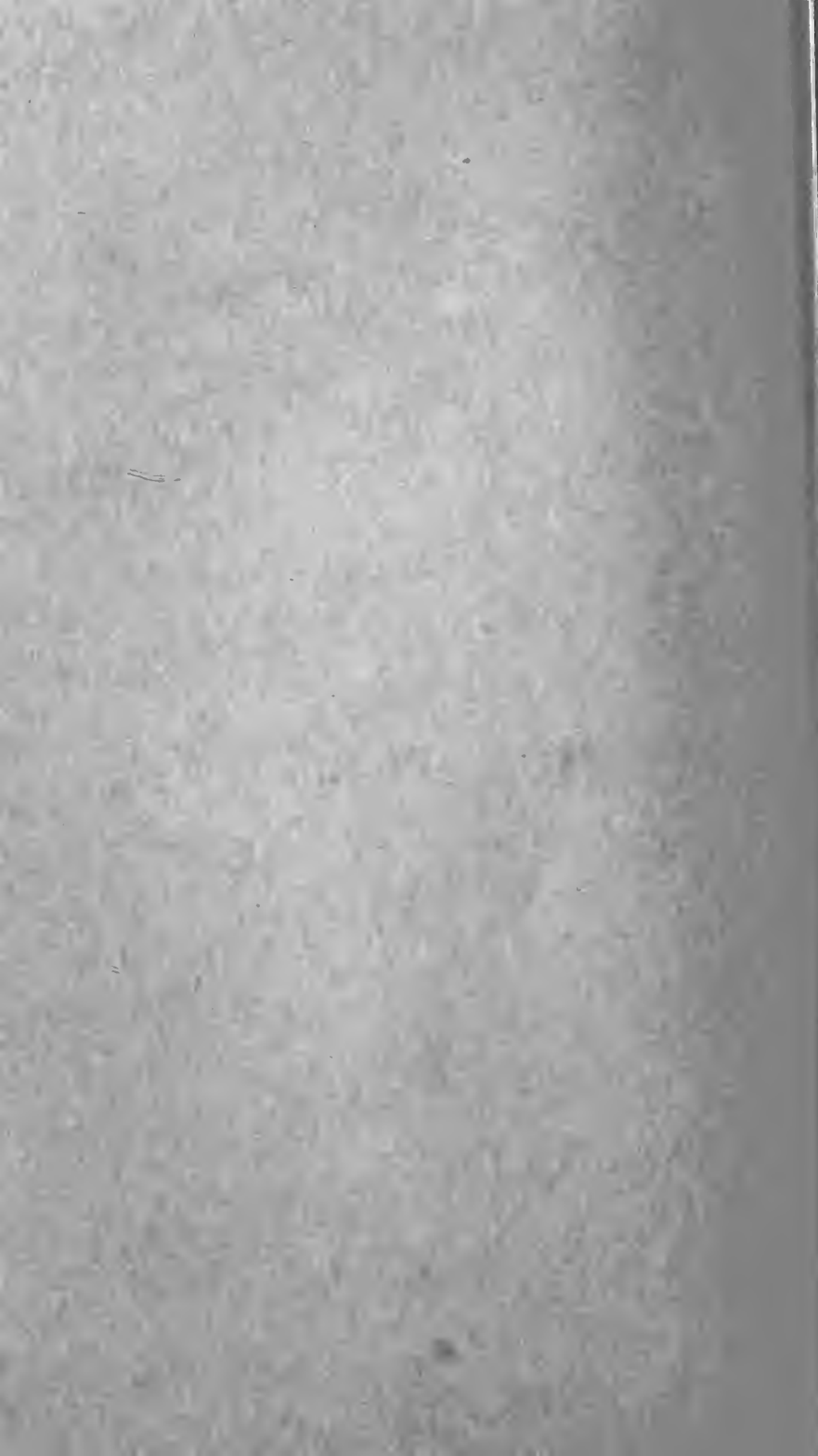
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No. 15,102

IN THE

**United States Court of Appeals
For the Ninth Circuit**

THE CANADA LIFE ASSURANCE COMPANY,
a corporation,

Appellant,

vs.

CHARLOTTE S. HOUSTON,

Appellee.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

Appellee (plaintiff below) filed her action to recover as beneficiary of an insurance policy on the life of her deceased husband, William M. Houston. The policy had been applied for on September 24, 1953 and was issued by appellant (defendant) company November 3, 1953. Mr. Houston died February 22, 1954 as a result of a gunshot wound suffered by him in the basement of his Berkeley, California home.

The insurance company defended on two grounds: First that the insured had misrepresented his drinking habits, and second that his death was the result of suicide, which under the terms of the policy was

an excluded risk if occurring within the first two years of the policy. At the trial it was stipulated that no question was raised concerning the adequacy or sufficiency of the proof of death which was received by the company May 4, 1954, and that the sole issues for determination were the affirmative defenses of misrepresentation and suicide (R. 73).

From the uncontroverted evidence it appears that at the time of his death, Mr. Houston was the United States manager for three foreign insurance companies (R. 156). He and his wife, to whom he had been married approximately 26 years (R. 337), resided in Berkeley, California. The older of their two daughters was married and the younger still lived at home. The Houstons' marriage had been very congenial and the Houstons enjoyed a close-knit, happy family life (R. 338).

On the Friday before Mr. Houston met his death he put in a full day at his office in San Francisco (R. 541) making plans for activities for the coming week. Part of the work he had planned for that day he deferred, stating to his secretary that he could do it the following Tuesday (R. 542 and 543). His secretary did not notice that Mr. Houston's manner or actions that day were any different than usual (R. 542). On the Saturday preceding his death he attended a party at his daughter's college sorority house at which he mingled with his friends and others there, appeared to enjoy himself and acted as was normal and usual (R. 340-341). On the following day, Sunday, he went to Church as usual with his

family, and spent the afternoon with two associates, Mr. Taylor and Mr. Wilkes, discussing the affairs of the southern Oregon ranch venture in which they were jointly interested (R. 599). Mr. Houston seemed his usual self all during this meeting (R. 575 and R. 599). That evening Mr. and Mrs. Houston, together with their daughter Ann, attended a dinner party given by Mr. and Mrs. Hanscom. This was a family dinner party inasmuch as Ann was engaged to the Hanscom's son (R. 342). Mr. Houston was in good spirits all during the evening and acted as usual (R. 456). Mr. and Mrs. Houston left the Hanscom's home at approximately 11:00 o'clock (R. 455) and returned directly home (R. 350). On this occasion Mr. Houston had had two drinks before dinner and none afterwards (R. 455).

Monday, February 22, was a holiday. In accordance with the usual custom in the Houston house the entire family slept late on holidays and weekends (R. 429 and R. 430). Mrs. Houston and Ann had gotten up at approximately 9:30 and had been doing some housework (R. 350).

At about 1:00 or 1:30 in the afternoon, Mrs. Houston went upstairs and awakened her husband. She asked him if he would like to join them for breakfast. Mr. Houston said he would (R. 351). He appeared to Mrs. Houston to be congenial, happy and in every respect normal (R. 351). Mrs. Houston then put a glass of tomato juice on the stairway by the bathroom door because, by that time, Mr. Houston had gone into the bathroom to wash up (R. 351). He

came out of the bathroom, drank the tomato juice, and came down to the first floor. He was dressed in his bathrobe, pajamas and leather slippers. He did not have on the trifocal glasses which he usually wore (R. 357).

As Mr. Houston came into the kitchen, his daughter, Ann, was singing, "Oh, What a Beautiful Morning". He gave her a goodmorning kiss on the forehead commenting that it certainly was a beautiful morning (R. 421). His daughter told him that they were going to have steak for breakfast and he said that sounded wonderful (R. 421). His appearance, actions and manner seemed perfectly normal to Ann. Mr. Houston then proceeded immediately down the basement stairs. It was not unusual for him to go to the basement as he kept much of his sporting equipment there and frequently spent his time there repairing or cleaning it (R. 372-3). Nor was it unusual for him to do so while awaiting preparation of a meal. A few minutes later, both Mrs. Houston and her daughter heard a thud. Mrs. Houston ran down to the basement where she found Mr. Houston lying on the floor bleeding and she called her daughter to phone for an ambulance.

Police officers who arrived shortly found the following:

The shooting occurred in a narrow passageway 18 inches wide (R. 372) at the rear of the basement at a point directly beneath the living room of the Houston home (Plaintiff's Exhibit 1). The floor in this section of the basement which was used as a storage area was

raised approximately 14 inches above the main basement level (R. 110, 111). The passageway led through many stored items to a book shelf at the rear corner. Among the items stored in that area on either side of the passageway were lawn chairs, a cedar chest, a sofa, sleeping bags, a garden trellis and some bed boards, the ends of which protruded into the passageway (R. 491-2, 364, 525). The distance from the floor of this part of the basement to the floor joists of the ceiling was approximately 5'6" to 5'11" (R. 125). The electric lights in the basement were off and the rear corner where the shooting occurred was rather dark (R. 415).

The rifle, an 1894 Winchester, 30 caliber, lever action, repeater, was found in the middle of the narrow passageway. It had only the one spent shell in it (R. 124). There were blood spots approximately in the area where the gun was found. Mr. Houston's body, face down, was found approximately 15' to 22' from the gun, in the direction of the basement stairs (R. 360) with his head toward the stairs (R. 111). Ammunition in a paper bag was found on the book shelf in the far corner of the storage area. It contained two different kinds of cartridges (R. 532), one of which would fit the Winchester (R. 107). The bag of shells was found rolled tight and closed (R. 121).

The bullet had entered the body through the chest (R. 108) in the general area of the heart (R. 122) but had not actually hit the heart (R. 506), and had come out through the back around the bottom of the shoulder blades (R. 109). There was an area around

the entrance hole that was blackened from powder and the clothing remaining over the wound was blackened (R. 122) showing that the gun muzzle was removed a distance from the body (R. 533) at the time of the shot. The bullet had entered the ceiling on a slight angle (R. 498). There was an indentation made by the butt of the rifle on the floor approximately in the area where the gun was found. The bullet from the gun had gone through the ceiling and entered the back of a chair in the living room where appellee's mother and daughter had been, and lodged under the upholstery towards the back of the chair (R. 503). The bullet coursed somewhat downward as it went through Mr. Houston's body and veered to the left (R. 506). Mr. Houston was a tall man, standing in height 6' 2". It was therefore necessary for him to stoop in the passageway area where the shooting occurred.

It was found possible to discharge the Winchester weapon by striking it when the hammer was down on the firing pin (R. 511). The gun could also be discharged by striking it on the butt on the floor (R. 511 and R. 528). The lever action on the gun was quite loose and it tended to open very readily (R. 513 and R. 529). Upon opening it would be in a position to cock and load the gun which would occur upon the closing of the lever, perhaps without realization of the person doing it (R. 513). When the lever was opened the trigger of the gun was exposed (R. 513 and R. 514). The gun was found to have a trigger pull of between $4\frac{1}{2}$ and 5 lbs. (R. 527).

All witnesses familiar with Mr. Houston's habits testified that he kept guns all over his home and that he habitually kept guns loaded (R. 409); also that he kept shells all over his home. For example there was a pistol in his bedroom closet (R. 426) and shells in the bureau in his bedroom (R. 409). Mr. Houston frequently stored guns in the basement on the raised platform area (R. 486). Some guns were observed there a few weeks before his death (R. 587, 593).

Mr. Houston had not had any serious illness or sickness within a year prior to his death, or at any time (R. 377 and R. 378). He had an excellent financial standing with a net worth of approximately \$100,000.00 (R. 381). He was successful in his business and had been offered the presidency of another insurance company shortly prior to his death (R. 551). He was a vigorous and dynamic man, who loved life and was very active in hunting, fishing and in other sports (R. 381-382). No suicide or other notes were found. There was no evidence of any statements to members of his family or others indicating suicidal intent (R. 391). All witnesses called for the plaintiff and Mr. Masters, insured's assistant manager, called by the defendant, testified that Mr. Houston had never exhibited any tendencies of depression or melancholia, or at any time had ever talked about or indicated that he might take his own life. On the contrary, they all testified that he was the type of man that loved life and enjoyed living thoroughly.*

*For the convenience of the Court, the portions of the transcript of testimony of each of these witnesses with respect to insured's

In his application for insurance Mr. Houston had answered the printed questions concerning his drinking habits, as follows:

	QUESTION	ANSWER
6-a	To what extent do you use alcoholic stimulants?	Yes, socially only occasionally.
6-b	Have you ever used them to excess?	No.

Appellant's evidence in support of its defense of fraudulent misrepresentation in this respect consisted of the testimony of a waitress in a Lakeview, Oregon cafe who stated that on two or three occasions in October, 1953, she had observed Mr. Houston in the cafe and that he apparently had had a considerable amount to drink and was intoxicated (R. 213-14)¹ and of the testimony of Virginia Wilkerson, daughter of a close friend of Mr. Houston. She testified that she couldn't say how much Mr. Houston had to drink as a general rule when he was in Lakeview without his wife (R. 254) and that he had been under the in-

disposition and lack of tendencies of depression or melancholia is set forth in Appendix A.

¹This testimony was admitted over appellee's objection that evidence of actions in October, 1953, after the date of the application are not admissible on the issue of misrepresentation in the application. As bearing on the credibility of this witness, it should be noted that she also testified that she saw Mr. Houston wearing a coonskin cap (R. 211) and yet appellant's other witness, Virginia Wilkerson, who had seen Mr. Houston whenever he came to Lakeview over a period of ten years (R. 250) testified that she had never seen him wear a coonskin cap (R. 323-4). Other witnesses who saw him frequently in Lakeview stated he had never worn such headpiece (R. 471 and R. 565).

fluence of alcohol a great deal of the time (R. 257)² This same witness further testified that her knowledge of his drinking habits was confined to his visits to Lakeview which occurred not more than four or five times a year (R. 260-261); that her testimony to the effect that on occasions he might have more than four highballs referred to periods of possibly six hours after a day of hunting (R. 269) and that the occasions on which she saw him drinking were social occasions (R. 318-319). The assistant manager to Mr. Houston, Mr. Masters, called as a witness by appellant testified that he lunched with Mr. Houston approximately once every two weeks, that on some occasions he would have several cocktails before lunch and that at dinners which the witness attended with Mr. Houston he would have two or three drinks prior to dinner and very seldom four (R. 169-170). Mr. Masters further stated that he had never seen the insured intoxicated or never in a condition as a result of drinking where he was unable to handle himself (R. 185). Mr. Youngers, an employee of Mr. Houston's company, called by appellant testified to the same effect (R. 154-155).

Appellee produced the insured's wife and two daughters, friends and business associates who knew him well over a period of years, including three attorneys, hunting companions, his personal secretary and a son-in-law, each of whom testified without exception that during the period each had known him

²This testimony is directly contradicted by that of the witness' father, Harry A. Utley (R. 567, App. pp. xv-xvi).

they had never known the insured to be intoxicated or under the influence of alcohol without full possession of all his mental and physical faculties.³

The trial Court stated in its memorandum opinion that it could not conclude that "defendant insurance company has shown by a preponderance of the evidence that insured committed suicide" (R. 52) nor that "the insured's use of alcohol was proven to be excessive or unusual so that it can be said that he misrepresented the facts in answering the general questions propounded to him in the application" (R. 42). The trial Court accordingly entered findings that Mr. Houston's death was not the result of suicide but was accidental (R. 75) and that his use of alcohol was neither excessive nor unusual and that his answers in the insurance application did not constitute a material or any misrepresentation (R. 75-76).

QUESTIONS PRESENTED.

1. Has the trial Court correctly determined that appellant insurance company failed to sustain its affirmative defense that insured's death was suicidal?

2. Has the trial Court correctly determined that appellant insurance company failed to sustain its affirmative defense that insured in the application for insurance made fraudulent misrepresentations concerning his habits in the use of intoxicating liquor?

³For the convenience of the Court, the portions of the transcript of testimony of each of these witnesses with respect to Mr. Houston's drinking habits is set forth in Appendix B.

3. Has the trial Court correctly determined that plaintiff is entitled to interest from the date of receipt of proof of death?

SUMMARY OF ARGUMENT.

Under applicable law and the terms of the policy in question, appellant had the burden of proof upon each of its two defenses that insured had committed suicide and that he had fraudulently misrepresented his drinking habits in the application for insurance. The trial Court having found that neither defense was established by appellant, the principal question here presented is whether there is adequate evidence to support the Court's findings. Since the questions of suicide and of fraudulent misrepresentation are both questions of fact, the further issue is presented whether on the whole record suicide or fraudulent misrepresentation is so clearly shown as to require reversal of the trial Court as a matter of law.

On the suicide issue, appellant bases its appeal upon the proposition that the so-called physical facts "present a theory of suicide" (App. Br. 34) and are inconsistent with any reasonable hypothesis of accident. In substance it is asserted that the mere fact insured was shot through the chest area while stooped in the basement of his home compels a conclusion of suicidal death. In so arguing appellant disregards entirely the presumption against suicide and the fact that such presumption is itself evidence to be considered by the trier of fact. Moreover, the inferences

which appellant draws from the established facts in order to support its suicide theory are not the only reasonably permissible inferences and it is not correct that the physical facts are wholly inconsistent with a theory of accident. The time of the shooting, its occurrence in insured's home with other members of his family present, the fact that insured struggled more than 15 feet after the shooting, and the uncontroverted fact that the gun could be fired by means other than intentionally pulling the trigger are all consistent with accident and inconsistent with suicide. In addition, all the other surrounding facts and circumstances, the family, business and financial position of insured, his temperament, character and good health, and particularly the absence of any motive or reason for intentional self-destruction all strongly support the trial Court's finding of accidental death and negative any theory of suicide, wholly apart from the presumption against suicide. Thus, not only has appellant failed to meet its burden of establishing suicide but the evidence clearly supports the trial Court's finding that the insured's death was accidental.

On the issue of fraudulent misrepresentation, appellant relies on references to one or more so-called drinking episodes in Lakeview, Oregon, as establishing that the insured was an habitual drunkard, who falsely represented to appellant in his application that he drank socially and occasionally and was not an excessive user of alcoholic stimulants. Appellant's testimony concerning insured's drinking habits in

Lakeview prior to the time of the application was contradicted by witnesses for appellee who regularly associated with insured there over a period of years. Appellee produced members of the family, social and business friends all of whom knew the insured well over periods of years and all of whom testified that he was not an excessive drinker and that they had never seen the insured under the influence of alcohol. All the evidence in the case supports the trial Court's conclusion that there was no evidence of drinking habits contrary to those indicated by insured in his application and that no misrepresentation of any sort was established.

The Court's rulings with respect to the admission and exclusion of evidence were obviously correct and in any event in no sense prejudicial to appellant or its theory of the case. The trial Court correctly allowed interest on the amount due from the date proof of loss was received by appellant. For all the foregoing reasons the judgment should be affirmed.

ARGUMENT.

- I. **THE TRIAL COURT'S FINDING THAT INSURED'S DEATH WAS NOT THE RESULT OF SUICIDE IS AMPLY SUPPORTED BY THE EVIDENCE.**
- A. **The trial Court correctly defined appellant's burden to prove the affirmative defense of suicide by a preponderance of the evidence.**

There can be no question under the authorities that the insurance company had the burden of establish-

ing its affirmative defense of suicide.⁴ This is the general rule in California and other jurisdictions.

28 *Cal. Jur.* 2d 370, Insurance Sec. 599;

29 *Am. Jur.* 1085, Insurance Sec. 1445.

The test to be applied both upon trial and appeal is set forth in the California case⁵ of *Beers v. California State Life Ins. Co.*, 87 Cal. App. 440, as follows:

“It must be borne in mind that the defendant entered the trial charged with the burden of overthrowing the presumption that the deceased was sane and that her death was not suicidal but from a natural cause. (Code Civ. Proc., sec. 1963, subd. 28; *Jenkin v. Pacific Mutual Life Ins. Co.*, 131 Cal. 121 [63 Pac. 180]; *Dennis v. Union Mutual L. Ins. Co.*, 84 Cal. 572 [24 Pac. 120]; 21 Cor. Jur., sec. 35, p. 95.) It rested upon

⁴The defense is founded upon a provision of the insurance policy that “During the first two years from the date of issuance of the policy suicide (whether insured be sane or insane) is a risk not assumed under this policy.” This situation should be sharply distinguished from those cases where plaintiff seeks recovery under an *accident insurance policy* or under a *double indemnity* provision where the policy generally provides for an amount payable in the event the insured died by accidental and not intentional means. In these situations some of the cases indicate that the plaintiff is bound to establish as a part of its prima facie case that the death was accidental within the terms of the particular provision. That however, is not the situation presented in this case under the particular policy in question. Here, plaintiff made out a prima facie case by establishing the policy and the fact of death which is not controverted. Defendant must show that the death comes within the exception, i.e., that the death was suicide (see 28 Cal. Jur. 2d 367-370).

⁵On matters relating to burden of proof, presumptions and weight of evidence, Federal Courts, under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64, follow the rule of decision of state courts of the state in which the Federal Court sits. *Occidental Life Ins. Co. v. Thomas*, 1939, 9 Cir., 107 F. (2d) 876; *Equitable Life Assur. Soc. v. MacDonald*, 1938, 9 Cir., 96 F. (2d) 437 (cert. den. 305 U.S. 624); Anno. 128 A.L.R. 405, 54 Am. Jur. 970, 982.

the defendant to overcome said presumption, or, in other words, to support the affirmative defense of suicide 'by a preponderance of clear and satisfactory evidence, direct or circumstantial.' (37 Cor. Jur., sec. 443, p. 640, and cases cited in the footnotes and also the above-named cases.) And whether the defendant introduced sufficient satisfactory proof to overcome that presumption or to sustain that defense was a question to be solved by the jury, with whose conclusion we are not privileged, legally, to interfere, unless the evidence of suicide is upon its face obviously such as to compel us to hold that no other inference but that of intentional self-destruction may reasonably be drawn. * * *

It is the established rule in California that the presumption against suicide is itself evidence, (*Byers v. Pacific Mutual Life Ins. Co.*, 133 Cal. App. 632, 637)⁶ which will stand for the fact it represents, i.e. that death was not intentionally self-inflicted, until in the mind of the trier of fact, it is overcome by clear and satisfactory evidence.

Beers v. California State Life Ins. Co., supra.

Where circumstantial evidence is relied upon to show suicide, the circumstances must exclude with reasonable certainty any hypothesis of death by accident. Thus, in *Prudential Insurance Co. of America v. Baciocco* (1929, 9 Cir.) 29 F. (2d) 966, the Court said:

⁶And see *Smellie v. Southern Pacific Co.*, 212 Cal. 540; *Speck v. Sarver*, 20 Cal. (2d) 585; *Everett v. Standard Accident Ins. Co.*, 45 Cal. App. 332, 339.

“It is not controverted that death by drowning is a death by external and violent means within the terms of the policy, nor is it questioned that in cases of this character where such a death is shown there is a presumption against the theory of suicide. *Metropolitan Life Ins. Co. v. Broyer* (C.C.A.) 20 F. (2d) 818. It is also conceded that by reason of this presumption appellant had the burden of proving the contrary, and that where, as here, evidence of self-destruction is circumstantial, the insurance company must fail ‘unless the circumstances exclude with reasonable certainty any hypothesis of death by accident, or by the act of another.’ *Tabor v. Mutual Life Ins. Co.* (C.C.A.) 13 F. (2d) 765, 769.

“We cannot say that the court below erred in holding that the circumstances fail to measure up to this requirement. * * * From a consideration of the entire record, we are of the opinion that the manner of the insured’s death is an unsolved mystery, and that we would not be warranted in disturbing the finding of the lower court.

“The judgment is therefore affirmed.”

Other authorities to the effect that it is not proper to find that a death was suicidal as a matter of law unless all the facts and circumstances exclude with reasonable certainty any hypothesis of death by accident are:

Wilkinson v. Standard Accident Ins. Co., 180 Cal. 252;

Beers v. California State Life Ins. Co., 87 Cal. App. 440;

Brooks v. Metropolitan Life Insurance Co., 27 Cal. (2d) 305.

See also:

Jenkin v. Pacific Mut. Life Ins. Co., 131 Cal. 121.

The facts and circumstances involved in each of these cases are summarized below⁷ by way of illustration of the application of the rule and for comparison with the facts of this case.

The trial Court in this case was aware of and referred in its opinion to the foregoing rules. It noted that the defendant had the burden of establishing the

⁷*Prudential Ins. Co. of America v. Baciocco*, supra, was an action on a policy providing for double indemnity in case of accidental death and also providing that in case of death by suicide within a year from issuance of the policy the liability of the insurer should not exceed the amount of premiums paid. Plaintiff and deceased were partners and each had taken out policies of life insurance on the other. Deceased was twenty-nine years old, had a wife and two children. The Court found that he was an industrious, temperate man. Defendant produced evidence tending to show that for some time prior to his death deceased had maintained unduly intimate relations with a woman other than his wife and that he was in a measure responsible for the dissipation of the assets of the business in which he and his partner were engaged. After an evening spent with the woman in question he was not seen after about 2:00 A.M. until the following morning his body was found lying on the beach below the Cliff House where it had apparently been cast by the sea. The surgeon who made the autopsy was of the opinion that death was from drowning. The trial Court found that the death was accidental and as noted the Appellate Court affirmed the judgment.

Wilkinson v. Standard Accident Insurance Company, supra, was an action on a policy for accidental death. Defendant appealed from a judgment in plaintiff's favor contending there was no evidence to support a theory of accident. Insured was found dead in his bedroom by his wife who had heard the report of a revolver. The body was found in front of a wash bowl with a bullet in the forehead. There were no powder marks or burns on the face. A revolver lay near his knee about three feet from his right hand. There was a nick on the edge of the wash bowl as if some hard object had fallen and had chipped and discolored the surface, which was not there before the accident. A firearms expert testified that the revolver could have been discharged by a blow on the hammer, and that it was light on the trigger. One of

affirmative defense of suicide, citing *Beers v. California State Life Ins. Co.*, supra, (R. 43). It further pointed out that if the evidence presented spelled out but one conclusion, namely suicide, the question of burden of proof should not be permitted to obscure the real issue, but that where as here the evidence has left the Court with the definite view that the shooting may have been the result of accident, the burden of proof does have significant importance (R. 46). To

defendant's witnesses testified to having seen the insured on the evening of the shooting and that he did not seem to have full control of himself. This testimony was contradicted by plaintiff. No motive for suicide was shown and the evidence shows without conflict, that insured was a man of happy disposition, that he was free from domestic or business troubles, and that he was cheerful and in excellent health up to the time of his death. The Appellate Court in rejecting the contention of defendant that the circumstances compelled the conclusions that the decedent committed suicide, stated that it is neither inherently incredible nor altogether impossible that he could have been accidentally shot and concluded that it was not justified in holding as a matter of law, that, under all the circumstances and the possible inferences to be drawn therefrom, the evidence adduced upon the whole case is not sufficient to support the findings of the jury implied from their verdict, that the death of the deceased was due to accident and not to suicide.

Beers v. California State Life Ins. Co., supra, was an action on an insurance policy in which a verdict was returned in favor of plaintiff. Defendant appealed upon the ground, among others, that the verdict was not supported by the evidence. The policy contained the usual clause exempting the risk of suicide occurring within a year from the date of the policy and defendant contended that the insured had committed suicide by taking and swallowing strychnine. The Appellate Court noted that the single question submitted to the jury was whether the poison was self administered with suicidal intent, and, the jury having returned a verdict negating the suicide theory, whether the Appellate Court is required to hold as a matter of law that the jury's verdict is without sufficient support in the evidence. The evidence was entirely circumstantial. The insured resided with a sister and was attending part-time high school. About a week before her death she had purchased at a drug store a bottle containing one-half ounce strychnine sulphates which she had charged to her personal account and which she told the druggist she wanted for the purpose of destroying rats. On the evening preceding her death, she had attended the movies with friends, following which they went to a tamale parlor

suggest, as does appellant, that the trial Court misapprehended the law (Appellant's Brief 32, 34) is a gross distortion of the record and the trial Court's opinion.

Appellant argues that its "burden was merely to produce evidence which would lead reasonably to the conclusion that the deceased committed suicide, regardless of any other theories that might be posed by the evidence". (App. Br. 32). The mere statement

for refreshments. She returned to her sister's home and upon her sister's arrival somewhat thereafter, she stated that she had had a wonderful time. A short time after they had all retired, the deceased exclaimed in a loud voice that she was very sick. The Appellate Court, after exhaustively reviewing all of the evidence, stated that insured's death involved a mystery not satisfactorily solved by the evidence. It conceded that the circumstances stressed by defendant were indicative of a designed, self-administered death, and would have supported a jury's determination of suicide, but these circumstances are not upon their face conclusive as against other circumstances which tend to sustain the assumption that her death was not intentionally self inflicted. The Court noted that the circumstances tending to support each theory were substantially equal in probative force and that therefore it was of exceptional importance that there was an entire absence of motive in the deceased having purposely or intentionally taken her life. The Appellate Court affirmed the judgment, concluding that the evidence is of a character which precludes determining as a matter of law that the defendant succeeded in overcoming the presumptions that the death of the deceased was not purposely self-inflicted.

Brooks v. Metropolitan Life Insurance Company, supra, was an action on an accident insurance policy which expressly precluded recovery in case of suicide. The jury returned a verdict in favor of defendant and the trial Court granted plaintiff a new trial on the ground of insufficiency of the evidence. The insured died in a fire which started in his bedroom. There were no eyewitnesses. Two years prior to his death he had undergone an operation for cancer, and during the months preceeding his death he spent most of his time in bed and was attended by day and night nurses. On the morning of the fire he was lying in his bed when the night nurse left. A large pile of newspapers were on top of the bed within easy reach. There was a bottle of rubbing alcohol on a dresser in the corner of the room. A portable gas stove was left burning when the night nurse went off duty. It was apparently located between the bed and a nearby cot. The insured was found dead on the cot, the lower portion of his body being badly burned. There were

of appellant's proposition not only offends common sense, but it is clearly contrary to established law as disclosed by the foregoing authorities. Appellant asserts that proof of a motive for suicide was not essential to its case⁸ and seems to imply that the trial Court

burned newspapers on the cot and ashes of burned newspapers on the floor. A portion of the bed was also burned. The Appellate Court observed that there was conflict in the testimony as to the physical factors and that conflicting inferences could be deduced from the facts proved. The Court concluded it could not say, as a matter of law, that the evidence compelled a conclusion that the death was suicidal. The order granting a new trial was accordingly affirmed.

Jenkin v. Pacific Mut. Life Ins. Co., supra, was an action on an accident insurance policy which required claimant to establish affirmatively that death resulted from accident. On trial before the Court, without a jury, judgment was for defendant and plaintiff appealed contending that the evidence was insufficient to support the trial Court's finding that the insured did not die of accidental injury. The evidence without conflict showed that the insured died of a gunshot wound received two days before his death; that a bullet entered the body in the front between the sixth and seventh ribs. No one was present at the time he received the injury. His statements to the physician as to how he was wounded were stricken out on motion of defendant. The Appellate Court noted that the only evidence from which to determine whether the wound was inflicted accidentally or purposely is the nature and character of the wound itself. The Court noted that the burden was on plaintiff by the terms of the contract to show that the wound was inflicted accidentally, but that it was not necessary that he should produce direct testimony of eyewitnesses. The Court also noted that it is contrary to the general conduct of sane men to take their own lives and that all the presumptions are in favor of sanity and against crime, that it will not be presumed that the insured purposely took his own life nor that he was murdered and that death must be attributed to accidental causes. It was held that the finding complained of is contrary to the evidence and the judgment was reversed.

⁸The fragmentary quotation from *Beers v. California State Life Ins. Co.*, supra (App. Br. 33), is misleading. The entire sentence from which it is extracted is set forth in the trial Court's opinion (R. 51-52) as follows: "As is true in its application to the proof of the commission of crime, particularly in the proof of the crime of murder, the rule is that, while the proof of motive is not indispensable, yet the presence or absence of motive is a circumstance going to the question of the quality of the act under inquiry."

found against the defense of suicide solely because no motive was established. Such suggestion is completely unwarranted. A fair reading of the trial Court's opinion discloses that it considered the absence of motive as only one of numerous factors correctly bearing on the quality of the act under inquiry.

It is apparent, therefore, that in order to establish the affirmative defense of suicide it was necessary for appellant to overcome the presumption against suicide by a preponderance of clear and satisfactory evidence, and, where, as here, the evidence is circumstantial, the circumstances must exclude with reasonable certainty any hypothesis of death by accident. This is obviously the rule adopted by the trial Court. A mere theory of suicide is not enough. Moreover, upon appellate review, the trial Court's determination against suicide is overcome and suicide as a matter of law can be said to exist only when the evidence is such that no other inference but that of intentional self-destruction may reasonably be drawn.

B. The evidence relied upon to establish suicide is insufficient to accomplish that purpose.

Appellant asserts and reasserts throughout its brief that the physical facts are consistent only with suicide and inconsistent with accident. Its suicide theory is predicated upon the facts that the wound was sustained in the chest while insured was bent over horizontal to the floor with his chest close to the muzzle of the upright gun and with only one cartridge in the gun. From this appellant argues that a finding of suicide must irresistibly follow.

It should be noted at the outset that in order to reach a conclusion of suicide from these facts it is necessary for appellant to indulge in a series of inferences. Appellant must infer for example that Mr. Houston knew that this particular gun was loaded and that the cartridge was in position to be fired or that he deliberately loaded and cocked the gun. Appellant must infer that insured deliberately placed the gun on the floor, muzzle up, and in a confined area assumed an unnatural, awkward and cramped position. And appellant must infer that insured deliberately placed his finger upon the trigger and pulled it, intending thereby to cause his own self-destruction. Without these inferences appellant cannot reach its conclusion of suicide. The mere physical facts themselves present no theory whatsoever.

It may fairly be asked whether these inferences are reasonable under all the circumstances and whether they are the only reasonably permissible inferences. Obviously the trial Court thought otherwise for it stated in its opinion: "The position of the gun and body appears equally consistent with the theory of accident to this Court." (R. 49). And: "The physical facts do not spell out a clear case of suicide. There is room for speculation as to how the shooting actually took place". (R. 52). The fact is that appellant's suicide theory does not withstand analysis.

The trial Court however carefully considered and rejected other factors which had been urged as supporting appellant's suicide theory. In response to the suggestion that insured's wife had originally told the

police officer that her husband had periods of depression, the trial Court correctly recalled the record that in the same breath she had told the officers that her husband had been in fine spirits during the week-end (R. 50, R. 114, R. 408). The time and place of the shooting do not compel a conclusion of suicide, nor the fact that Mr. Houston wasn't then planning any hunting trips and that he was usually careful with guns (R. 50).

As the trial Court notes, the foregoing so-called physical facts are all that supports a suicide theory. The facts themselves are not clear-cut and do not constitute a preponderance of clear and satisfactory evidence of suicide. Nor can it be said that the inferences reasonably to be drawn from such facts are consistent only with a theory of intentional self-destruction and wholly inconsistent with the conclusion of accidental death.

With the exception of the case of *Brotherhood of Maintenance of Way Employees v. Page*, 123 S.W. (2d) 536, the cases discussed in Appellant's Brief (pp. 36-39), as illustrating a situation where suicide has been held adequately established as a matter of law, were all considered and commented upon by the trial Court in its opinion. The trial Court concluded however that "The cases cited by defendant all have one or more vital differences from the facts and circumstances here presented, such as location of the wound, kind of firearms used, and particularly statements indicating suicidal intent." The same comment is applicable to the *Brotherhood of Maintenance of*

Way Employees v. Page, supra, which involved a pistol shot through the head, where the insured had been out of work for more than a year because of continued sickness and on the day of his death was in the depths of utter despair on account of his physical and financial condition. None of the authorities relied upon by appellant are sufficiently close to the facts of this case to constitute authority for this Court to determine, contrary to the trial Court's findings, that the foregoing facts establish suicide as a matter of law.

C. The trial Court did not err in excluding certain evidence offered by appellant.

Appellant complains that the trial Court improperly excluded evidence offered by them on the question of motive. The excluded evidence consists of an insurance adjuster's report and a hypothetical question asked of one Dr. A. E. Bennett.

Over the objection of appellee, appellant read into the record the report of J. W. Van Doren, an insurance adjuster, dated October 22, 1953 (R. 237-246). Appellee thereupon made a motion to strike the report on the ground that it was incompetent, irrelevant, immaterial, that it is hearsay as to Mr. Houston and the plaintiff in the case and it was shown that Mr. Houston had not seen the report or had any conversation with anyone about it either before or after it was prepared (R. 247-248), which motion was granted by the Court. The report was apparently offered to show a possible motive for suicide, consist-

ing of remorse. It is insisted that the report itself is somehow indicative of Mr. Houston's state of mind.

The first difficulty with this argument is its remoteness in point of time. The incident involved occurred October 19, 1953. The report itself is dated October 22, 1953. It is uncontradicted in the record that the only aftermath of the incident was a letter received by Mr. Houston, dated November 9, 1953, which was turned over to his attorney, who dictated a reply on November 10, 1953 (R. 578-580) and that no other communication was received concerning it (R. 582). Obviously, the incident of October, having been laid to rest as far as Mr. Houston was concerned early in November, is not competent evidence of Mr. Houston's state of mind on, or even a reasonable time before, his death, February 22, 1954. Moreover, the inference that, as a result of the incident, Mr. Houston suffered a remorse sufficient to cause him to deliberately take his life almost immediately upon awakening on February 22, 1954 is under the circumstances of this case wholly unwarranted and without any support whatsoever.

Appellant erroneously asserts that an agency relationship existed between Mr. Houston and the author of the report. Mr. Youngers, upon whom appellant relies in this respect, testified explicitly that the morning after the accident Mr. Houston phoned him and asked him to take care of the question of the collision damage to his automobile and "to report the liability feature of the case to the London Guaranty Company" (R. 146). It should be noted the report itself

was addressed to this company (R. 237) which insured Mr. Houston's company for comprehensive liability coverage and from whose files the document in question was produced (R. 206). This evidence establishes that the adjuster was the agent of the liability carrier but is not proof of any agency relationship between Mr. Houston and the adjuster.⁹

Appellant also objects because the trial Court sustained appellee's objection to the hypothetical question posed to Dr. A. E. Bennett. Appellee's grounds for objection were that the question is "compound, unintelligible, assumes facts not in evidence, calls for the conclusion of this witness which is not subject to expert testimony, that there is no showing that this doctor ever examined Mr. Houston and upon the ground that it is not proper examination" (R. 297). The trial Court sustained the objection.¹⁰

The rejected hypothetical question (R. 295-6, App. Br. 24-26) obviously assumed facts not in evidence. Among these are reference to "several known press-

⁹The case of *Guberman v. Weiner, Consolidated Hotels, Inc.*, 10 Cal. App. (2d) 401, cited by appellant (App. Br. 55) for the proposition that an adjuster's report is a declaration of an agent, admissible in evidence against the adjuster's principal, does not in fact support that contention. The case holds, as is set forth in headnote 3, that where the written report of the operator of a motor vehicle to the insurance carrier of his employer was made at his employer's direction, detailed facts of the accident and admitted that he was engaged upon business of his employer, such report, together with the facts stated therein was competent evidence, irrespective of any question of agency.

¹⁰Dr. Bennett was however permitted to testify generally concerning so-called cyclothymic personalities, "individuals who are subject to mood swings, either elation or depression, that go beyond normal" (R. 293) and that 15 to 20 per cent of such personalities end up as suicides (R. 304).

ing debts” “accustomed to having alcoholic drinks before lunch and dinner” “difference in demeanor described as a ‘Jekyll and Hyde’ transformation” “under influence of alcohol part of the time” “had periods of depression and recently had been depressed, shortly before his death.” This in itself is enough to justify the objection. 58 *Am. Jur.* 483, Witnesses § 854; 19 *Cal. Jur.* (2d) 30, Evidence § 301. Moreover, the entire question cannot be said to represent fairly the evidence in the case. Even if the testimony of appellee’s witnesses who knew insured well over periods of years were entirely disregarded, the statements of a waitress who supposedly saw him on three occasions and of a police officer who interrogated his widow immediately after the shooting, together with all the other innuendoes supplied by appellant, do not support the characterization of Mr. Houston as an abnormal, emotionally unbalanced person. The rejection of the question was therefore a wholly proper exercise of the trial Court’s sound discretion.

19 *Cal. Jur.* (2d) 30, Evidence § 301;

Travelers Insurance Co. v. Drake, (1937, 9 Cir.) 89 F. 2d 47, 50.

See:

People v. Wilson, 25 Cal. (2d) 341, 348;

Bickford v. Lawson, 27 Cal. App. (2d) 416, 426.

Assuming without conceding that the trial Court erred, the exclusion is obviously not prejudicial. For an affirmative answer would have established nothing

more than Dr. Bennett's opinion that the fictional individual described is a suicidal type. This opinion, like any other expert opinion, would not have been binding on the trial Court.

19 *Cal. Jur.* (2d) 37, Evidence § 309.

Nor does the assertion that an individual is one of a group prone to suicide constitute competent evidence that a particular individual at a particular time did in fact intentionally destroy himself.

The whole line of Dr. Bennett's testimony is entirely irrelevant for the further reason that there is nothing to connect the generalized composite individual described by him as prone to suicide with the insured in this case. See *Estate of Gould*, 188 Cal. 353, 356. The witness never examined or tested, much less even saw the insured. Appellant cites *Smith v. Metropolitan Life Ins. Co.*, (Ill.) 47 N.E. (2d) 330, and *McClelland v. Great Southern Life Ins. Co.*, 220 S.W. (2d) 515, for the proposition that expert testimony of medical specialists is admissible to show that an insured possessed suicidal tendencies. In both those cases however the medical expert had examined or treated the insured prior to his death. In the *Smith* case, which appellant quotes extensively, the trial Court had permitted Dr. Brown to testify that he had examined the insured about a year before his death but on grounds of remoteness in time had sustained objections to the doctor testifying as to statements then made to him by insured. The Appellate Court, after concluding that a retrial was necessary because of an erroneous jury instruction, noted that

the migraine headaches of which insured had complained to Dr. Brown continued up to the time of his death and stated:

“The purpose of the proffered evidence was to show by Smith’s own statements, as related to Dr. Brown, that these frequently occurring headaches brought on depressive moods, irritability and restlessness, which he sought to alleviate by excessive drinking, and which affected him to such an extent that on two occasions he had contemplated suicide, and thereby lay the foundation for Dr. Brown’s opinion that Smith’s migraine was associated with depressive episodes, typical in phases of manic-depressive psychosis, having a tendency toward suicide by a patient so afflicted.” (47 N.E. (2d) 330, 333).

Contrast the evidence upon which Dr. Brown was to base his expert opinion of Smith’s possible suicidal tendency with the situation in the present case. Similarly, in the *McClelland* case, the evidence disclosed that the insured had been suffering from an emotional illness evidenced by fixed depression, was undergoing treatment for such illness and was to return for electro-shock treatments the day following his death.

Appellant also specifies as prejudicial error the trial Court’s ruling excluding the portions of two police officers’ reports which contained opinions and conclusions concerning the cause of insured’s death. Prejudicial error is also claimed in the trial Court’s ruling striking testimony of the coroner that prior to the inquest he had informed appellee’s counsel that he (the coroner) had reached a conclusion as to the

cause of death and nothing he had heard at the inquest had changed that original impression (App. Br. 626-27). Appellant argues that the death certificate and verdict of the Coroner's Jury were irrelevant and immaterial and, these having been admitted in evidence, appellant had the right to explain the circumstances surrounding the making of the verdict and the right to rebut the opinions impliedly expressed in the verdict. If, in fact, the death certificate and verdict of the Coroner's Jury were irrelevant and immaterial, it is difficult to conceive how appellant could have been prejudiced by a refusal of the trial Court to permit rebuttal testimony; in fact, counsel for appellant admitted on the trial that he wouldn't be prejudiced by the admission of the verdict¹¹ (R. 334).

As conceded by appellant, the death certificate and verdict of the Coroner's Jury were, under the authorities, properly admissible, not as appellant contends for the purpose of supporting the testimony of appellee's experts, but as prima facie evidence of the facts therein stated. *Walther v. Mutual Life Ins. Co.*, 65 Cal. 417; *Ellenberger v. City of Oakland*, 76 Cal. (2d) 828, 835; *Bryson v. Manhart*, 11 Cal. App. (2d) 691 (cited by appellant). The fact thus established was that the Coroner's Jury could not determine whether the death was suicidal or accidental. The

¹¹ Although the death certificate and verdict of the Coroner's Jury were admitted subject to appellant's motion to strike (R. 336), it does not appear that appellant ever in fact made the motion, although at the time of briefing appellant did move to strike the testimony of Dr. Kirk and Mr. Bradford concerning their tests upon the gun in question.

testimony of police officers, who made the initial superficial investigation of the shooting, and of the coroner, whose knowledge of the circumstances was obviously limited to knowledge of the condition of the body of deceased, would not in any sense have detracted from the fact that the Coroner's Jury could not reach a determination. Therefore it would not constitute competent rebuttal evidence on the point for which appellant purported to offer it.

The plain fact is that appellant desired to show the opinion of the police officer¹² and coroner, based upon initial superficial investigation, that the death was suicidal. There could be no question that such conclusion by any witness, expert or non-expert is not admissible for the reason that it would constitute a transgression upon the function of the trier of fact to determine the issue of whether death was intentionally self-inflicted.

D. The facts and circumstances are consistent with the theory of accident and inconsistent with one of suicide.

The physical facts, together with all the surrounding circumstances, disclosed by the record, amply support the trial Court's finding that Mr. Houston's

¹²Moreover, even if such testimony were admissible it should be noted that Inspector Parker testified that his assignment was the investigation of homicide and felony assaults (R. 617), from which it is obvious that his initial investigation as well as that of other police officers was for the purpose of determining whether there was any indication that a crime had been committed, i.e., whether Mr. Houston had been murdered, and the result of such investigation, even if otherwise admissible, would not constitute competent evidence on the issue before the Court of whether insured's death was intentionally self-inflicted.

death was accidental and not intentionally self-inflicted. Among the established facts and circumstances which support a theory of accident and are inconsistent with the suicide theory are the following:

The time and place of the shooting are consistent with a theory of accident and do not compel a conclusion of suicide. The brief time interval of ten or fifteen minutes which elapsed from insured's being awakened from a sound sleep to the time of the shot (R. 351), together with his known actions during that short period, make it highly improbable that a plan of deliberate self-destruction would or could have been conceived, formulated and carried into effect. There was simply not enough time for all that to have transpired. It is likewise inconceivable that with a pistol in his closet (R. 426) and shells available in his dresser drawer on the second floor (R. 409), he would have gone down to the basement to obtain a rifle where a shot ranging upward might have endangered members of his family. Appellant suggests that if insured had any reason other than suicide in going to the basement, he would have said something to his wife and daughter. With equal logic, it can be inferred that if he had in fact intended suicide on going to the basement, he would have made some excuse or pretext for going, so as to forestall any possible interruption. Appellant's assumption that insured's intention for going to the basement was suicide is entirely unwarranted, since he went there within approximately ten minutes of the time he was awakened and had arisen (R. 351), since according

to members of his family he frequently visited the basement dressed in his bathrobe and slippers and that it was not unusual for him to do so while awaiting the completion of the preparation of a meal (R. 372).

Appellant notes that the only shell in the gun was the one which was fired, from which it is assumed that the single shell had been inserted in the gun by insured immediately prior to the firing. Such assumption is entirely unwarranted in view of the uncontroverted testimony of several witnesses that insured habitually kept loaded guns around the house (R. 388, 432); that insured was without glasses which he normally wore (R. 357); that the paper bag where were located the only other shells which would fit the gun was found closed in place on a shelf (R. 121) and that only a minute or so elapsed between the time the insured went to the basement and the shot was fired (R. 423). In that brief space of time insured would obviously have been unable to locate the gun, open the paper bag and find the right size shells among a variety of shells, carefully close and replace the paper bag, load the gun and position himself to fire it as appellant assumes.

The position of the gun and body at the time the shot was fired and the consequent nature of the wound and path of the bullet are inconsistent with a suicidal theory. Appellant assumes that the gun was deliberately placed on the floor, pointed directly upward and that insured intentionally leaned over the muzzle before firing the shot. For one to assume such an un-

natural and uncomfortable position does not square with reality. The overall length of the gun was three feet (Defendant's Exs. B, D). It was obviously possible and considerably easier for insured to have held the gun in front of him and reached the trigger without the necessity of nearly bending double. This also would have avoided the possibility of a bullet harming any member of his family on the floor above. Appellant's theory that the gun was deliberately positioned as it was is also refuted by the fact of powder burns. If insured had leaned over the muzzle as supposed by appellant, it would have been pressing against his chest and according to the testimony of Mr. Bradford there would have been no powder burn (R. 533).

The factor which most eloquently supports a theory of accident is the fact that after the shot was fired, the insured, mortally wounded, struggled 15 or more feet from the narrow passageway in which the accident occurred toward the exit from the basement and help. As the trial Court observes, in none of the cases involving suicide by shooting did a person bent on self-destruction make any effort to change position after mortally wounding himself (R. 51).

A physical factor of importance (although the trial Court has stated that it would have reached the same decision without considering it (R. 52)) is the fact that the gun in question could be accidentally fired in any one of several ways. It was testified that with the shell in the firing chamber and the hammer closed the gun could be fired by a sharp blow at the extreme

butt of the gun (R. 515, 521, 529). This evidence is uncontroverted. Appellant produced no expert on guns who examined it or made any tests concerning its firing characteristics. As discussed, *infra*, the testimony of appellee's gun experts was competent and clearly admissible. Appellant contends that the fact that a butt impression of the butt of the gun was left on the basement floor establishes that the gun must have been positioned before firing rather than dropped. This conclusion does not necessarily follow, since it may have been possible for the gun to have been dropped with sufficient force to cause it to fire and not great enough to cause a mark in the floor. Or, if any such impression had been made by the dropping of the gun it would have been obliterated by the subsequent recoil mark. The fact that the gun could be accidentally fired distinguishes this case from many cited by appellant. It is a fact wholly inconsistent with a theory of suicide.

Thus, the so-called physical facts relied upon by appellant not only are not such as to eliminate all reasonable possibility of accident, but in fact they strongly indicate accident. There is nothing in those facts inconsistent with an accident. It is certainly not impossible, nor inherently improbable, that insured went into the far corner of the basement to obtain the gun which was standing in that corner with its butt on the floor and the barrel leaning against the wall; that he grasped it by the barrel and turned to come back to the open area of the basement; that in the congested area where his passageway was only

approximately a foot and a half wide he naturally held the gun before him so as to avoid hitting it on any of the objects with which the passageway was lined; that, being partially stooped because of the low ceiling, he stumbled and started to fall forward and involuntarily thrust the gun forward and downward to the floor in a vain effort to support himself; and that the bar on the butt as it hit the floor was sufficient to cause the hammer, which was in a closed position, to fire the shell, which had been left in the firing chamber, just as he pitched forward over the barrel. That he had forward momentum at the time of the firing, and was not standing stationary and flat-footed as presumed by appellant, is strongly indicated both by the fact that the gun itself fell forward in the direction he was moving and by the fact that, though mortally wounded, he was able to move forward fifteen or more feet from the spot of the shot to the place he was found.

There is nothing contrary to the laws of physics or unnatural in the foregoing thesis. It is uncontroverted that the gun could have been caused to fire accidentally in the manner suggested. The movements of insured in the few instants before, during and after the shot are exactly what could reasonably be expected of a big man in a congested and confined space. Even if his actions might seem foolish or careless by other men's standards, they were certainly not intentionally suicidal beyond question.

On the other hand, to sustain appellant's suicide theory would require the Court to assume that insured

deliberately placed himself in an unnatural and obviously awkward position; that, notwithstanding his knowledge of firearms, he selected a cumbersome rifle rather than a handy pistol, readily available; that he deliberately aimed at his chest with the possibility of merely maiming himself rather than the certain method of aiming through his mouth or at another portion of his head. (It should be noted that the bullet in fact missed his heart.) In short, the inferences and assumptions supporting an accident theory flow naturally and logically from the known facts and circumstances, while those necessary to sustain a suicide theory are inconsistent with and contrary to the evidence.

Thus, even if the case were viewed narrowly, disregarding all other facts and circumstances and looking only at the so-called physical facts as appellant would have this Court do, appellant's suicide theory is without rational support. This Court will, however, properly take into consideration *all* the surrounding facts and circumstances. These make crystal clear that the death of insured was an accident and not suicide.

It is uncontroverted that insured was in good health and was successful in business and had no financial worries or domestic difficulties; that he had made definite plans and commitments both for the immediate (R. 347, 543) and more distant future (R. 553). All of appellee's witnesses agreed that insured was one who loved life and had every reason to live. On the trial appellee did not stint in producing those

witnesses who knew insured most intimately in all the varied phases of his active life and particularly those who saw him during the last few days of his life, all in order to portray accurately for the Court the nature and character of the man. The cumulative effect of the testimony of those witnesses is simply that insured was not the kind of person to destroy himself without cause and that there was no cause. These witnesses were available to appellant for cross-examination, but nothing was developed to controvert their testimony in any material respect. In fact the testimony of appellant's own witness Masters corroborated that of the other witnesses who knew insured well (R. 196-197).

Appellant argues that it has been judicially held that facts of this sort are not inconsistent with suicide (App. Br. p. 41). The case of *Burkett v. New York Life Ins. Co.*, 56 Fed. (2d) 105, relied upon by appellant, was an action to recover under the double indemnity provision of an insurance policy. The fatal wound was through the roof of the mouth and into the brain. A physician who had examined insured testified that the insured was a neurotic. He had gone into a store, picked up a gun behind a counter, opened it disclosing that it was empty, then continued past boxes of shells out the rear door of the store, following which a shot was heard and his body was found about 3½ feet from the door. A gun expert testified that the gun would not be fired by being dropped, unless it fell directly on the hammer and that it would not be fired by hitting a hard surface

in falling. The Court held that the beneficiary in that case had failed to sustain her burden of proof that the death was accidental. This case, like others, which can be found where the trier of fact's determination of suicide has been upheld on appeal, is vastly different from the situation here presented.

The true rule applicable here is that set forth in *Beers v. California State Life Insurance Co.*, supra, that where there are circumstances tending to sustain a suicide theory and others tending to negative that theory, each of which may be viewed as substantially equal in probative force, it then becomes of exceptional importance for the trier of fact, and of even greater importance on appeal, that there was an entire absence of motive for insured's purposely or intentionally taking his life (87 Cal. App. 440, 463). The absence of a farewell note or letter or of any statement indicating suicidal intent at any time preceding the shooting, or of any reason for suicide, makes it clear that insured did not in fact intentionally position himself and deliberately pull the trigger as supposed by appellant. This is particularly true in light of the evidence of insured's character and circumstances which unerringly show a positive intention to continue to live.

E. Testimony of appellee's experts concerning the characteristics of the gun was admissible and in any event appellant was not prejudiced by the admission of such evidence.

Upon the trial, appellant's objection to the testimony of Dr. Kirk as to firing tests conducted with the gun which shot Mr. Houston was that it would

constitute evidence of tests which any one could perform, and that it would be speculation and conjecture to testify how a gun might be accidentally discharged, when there is no proof of accident (R. 507). Appellant relied at the trial and in its motion to strike and relies in its brief (App. Br. pp. 50-51) upon the case of *Long v. California Western States Life Ins. Co.*, 43 Cal. (2d) 871, as supporting its position. In that case, however, the gun expert had been asked to testify concerning tests he made as to a manner of tripping or falling to produce wounds such as were inflicted upon deceased, not tests as to the mechanical operation and firing characteristics of the gun in question as are here involved.

That an expert witness may testify to his opinion as to the mechanical operation of a gun and the method by which it may be fired is well established (19 Cal. Jur. (2d) 95, Evidence, § 367; *People v. Willis*, 70 Cal. App. 456, 472-3). It should be noted that appellee's two experts testified that the results of their tests and examination of the gun disclosed that the gun could be fired by means other than intentionally pulling the trigger, in other words that *it could be fired accidentally* (R. 512-3, R. 529). This was certainly well within the field of expert opinion. It was evidence of the mechanical characteristics of a particular gun—a matter upon which each expert was able to testify by reason of special training and experience with firearms. Neither expert was asked or purported to testify that the shot which actually killed Mr. Houston was in fact accidental; they ex-

pressed no opinion as to the cause of death, as in the case of *People v. Heacock*, 10 Cal. App. 455, cited by appellant. That case is not here in point.

Appellant's objection to the testimony of Dr. Kirk and Mr. Bradford was limited to the contention that it was not within the scope of expert testimony and was speculative (R. 507, 510, 511, 526). In its brief following trial appellant suggested that the evidence of firing tests was inadmissible for the reason that the shells used in those tests were not the same as the fatal cartridge, since those tested had had the projectile removed as a safety precaution. Mr. Bradford testified that the cartridges used for tests were obtained from the paper bag in the basement of the Houston residence and were the same as that which had killed Mr. Houston, except only that the projectile had been removed (R. 531-32). Appellant introduced no evidence that the removal of the projectile from the cartridge would alter the gun's firing characteristics. The trial Court concluded that such removal in no way affected the tests on the mechanical operation of the gun (R. 52). There is no question that the gun upon which the tests were conducted was the same gun which killed Mr. Houston (R. 525). Certainly there was a sufficiently substantial similarity between the fatal shell and the test shells used in the same gun to justify the admission of the tests (18 Cal. Jur. (2d) 678, Evidence, § 205). The admission of such evidence is a matter within the discretion of the trial Court. (See *Ortega v. Pacific Greyhound Lines*, 20 Cal. App. (2d) 596, 597-8; Anno.

8 A.L.R. 18, 24, 37-38; *Greene v. U. S.* (1927, 9 Cir.) 19 Fed. (2d) 850, 852.

In its brief, appellant for the first time raises the objection that there was a lack of proper foundation for evidence of tests on the gun, since there was no evidence that it remained in the same condition from the date of death, February 22, 1954, to the date of the tests, about March 15, 1954 (R. 496). This objection, if it has any validity at all, obviously comes too late to be considered when raised for the first time on appeal.

See: *Laurson v. Tidewater Associated Oil Co.*,
123 Cal. App. (2d) 813, 817, 818;
Johnson v. Reily, (D.C. Cir.) 160 Fed. (2d)
249, 250-251.

The suggestion is obviously without merit; it appears that the gun was in the custody of the police from the time of the shooting until the tests were conducted (R. 496).

In any event, the evidence concerning the tests was not prejudicial. This is most apparent from the trial Court's opinion in which it was stated that the trial Court would have reached exactly the same decision in the case, whether the evidence of the tests had been presented or not (R. 52). Moreover, appellant itself questioned Dr. Kirk about the results of the test (R. 519-520) and it is not now in a position to object that it was prejudiced. (See *People v. Dye*, 81 Cal. App. (2d) 592, 961-62; *People v. Dollor*, 89 Cal. 513, 517.)

II. THE TRIAL COURT'S FINDING THAT INSURED DID NOT FRAUDULENTLY MISREPRESENT HIS HABITS IN THE USE OF INTOXICATING LIQUOR IS SUPPORTED BY THE EVIDENCE.

A. Appellant had the burden of establishing the affirmative defense of fraudulent misrepresentation.

The normal rule requiring a defendant to prove an affirmative defense is specifically applied to defenses alleging material misrepresentation in applications for policies for life or accident insurance. In *Everett v. Standard Acc. Ins. Co.*, 45 Cal. App. 332, where the defense of misrepresentation in the application for an insurance policy was raised, the Court stated:

“The special defenses raised by appellant were all based upon the alleged fraud of decedent. The presumption is always against fraud. This presumption approximates in strength that of innocence of crime (*Truett v. Onderdonk*, 120 Cal. 581, 588, (53 Pac. 26).) One who seeks relief from fraud must allege it and prove it by clear and satisfactory evidence. A mere suspicion of fraud is not sufficient. * * *”

To the same effect see *Scoles v. Universal Life Ins. Co.*, 42 Cal. 523, and *Mickschl v. The National Council of The Knights and Ladies of Security*, 40 Cal. App. 100.

B. The evidence establishes that insured did not misrepresent his drinking habits.

Representations concerning habits as to the use of alcohol necessarily refer to the time that the application is made and such reasonable time prior thereto as would allow one to form a habit. Similarly, such

representations do not refer to an occasional or exceptional use of alcoholic beverages but to the habitual and customary use. 26 A.L.R. 1279, 1281-82, 1284; 29 *Am. Jur.* 474, Insurance, § 584.

The case of *McEwen v. New York Life Ins. Co.*, 42 Cal. App. 133, involved questions and answers very similar to those in this case. The insurance company defended on the ground that the answers contained fraudulent misrepresentations. The jury, in addition to a general verdict in favor of plaintiff, rendered special verdicts finding that the answers to the questions were true and that the insured was not an habitual drinker. Upon appeal it was contended that the jury's special verdicts were contrary to the evidence. The Appellate Court held otherwise, stating:

“* * * suffice it to say that as to 4a the question was not whether McEwen had used liquor at all, but assumed as a fact that he did use them. The inquiry is directed solely to the extent of his daily consumption of such beverages. Hence, conceding that, as shown by the evidence, he did at times, varying in intervals of two to four weeks, drink both beer and whisky, such fact is not inconsistent with his answer, ‘No daily habit—occasional beer.’ The response made cannot, as urged by appellant, be construed as a representation that he never drank whisky at all; but as we interpret the question and answer, it was simply a statement to the effect that he was not addicted to its daily use.

“The reply to question 4b is that he never at any time had used such liquors to excess. No

court, so far as we are advised, has undertaken to define what constitutes the excessive use of alcoholic spirits. * * * The meaning of the word 'excess,' as here used, is largely a matter of opinion, depending upon the capacity of the individual and liberality of view entertained upon the subject by the individual, whose opinion might again be governed by the time, place, and occasion. (*Clinton v. State*, 64 Tex. Cr. 446, [142 S.W. 591]; *Biermann v. Guaranty Mut. Life Ins. Co.*, 142 Iowa, 341, [120 N.W. 963].) In the absence of any standard of measurement, the question is one of fact to be determined by the jurors, whose conclusion, as stated, would depend largely upon their views as to what constitutes excess in the use thereof. It cannot be determined upon the quantity used, because of the fact that an amount which might affect one individual would not be noticeable upon another. The most of the testimony bearing upon the question was given by witnesses from Daggett, near which place it appears deceased was engaged in the operation of a mine and from which he, from two to four weeks, went to Daggett, at which times he concededly drank more or less whisky and beer. There is little testimony touching the quantity of his libations. Apparently he did not drink sufficiently to interfere with his transaction of business, and it fairly appears that there was a conflict of evidence as to the effect upon him of that which he did drink. Under the circumstances shown, we cannot say that the jury, upon the testimony as to his habits of drinking at Daggett, were not justified in their verdict that he did not drink to excess."

See also *Mayfield v. Fidelity & Casualty Co.*, 16 Cal. App. (2d) 611.

The assertion in Appellant's Brief that the evidence is undisputable that Mr. Houston habitually used alcoholic stimulants and at times used them to excess is wholly unsupported by the record. The testimony of appellant's witnesses on the subject of Mr. Houston's drinking habits is set forth in the statement of the case (*supra*, p. 8). As previously noted, the transcript of the testimony of appellee's witnesses on this subject is set forth in Appendix B. It is apparent that, even viewed most favorably to appellant, the evidence presents a mere conflict and that the overwhelming weight of the evidence is clearly that Mr. Houston was not an habitual drunkard, that his use of intoxicants was not immoderate or excessive and that his use of them was social and occasional and not habitual. It should be noted again that the testimony most strongly relied upon by appellant concerns the alleged intoxication of Mr. Houston on an occasion occurring a month after the application was signed by him.¹³ The trial Court's conclusion in its opinion that the insured's use of alcohol was not proven to be excessive or unusual so that it could be said that he misrepresented the facts in answering the questions propounded to him in the application is clearly supported by all the evidence in the case; its

¹³It should also be noted that the insurance application was taken and signed by Robert Utley (R. 375-376), an agent of appellant who knew insured well and who certainly had ample opportunity to be informed concerning Mr. Houston's drinking habits in Lakeview, Oregon.

formal findings that the answers do not constitute a material misrepresentation or any misrepresentation with respect to insured's use of alcoholic stimulants is obviously correct.

C. The trial Court did not err in excluding testimony of appellant's assistant secretary concerning appellant's underwriting practices respecting drinking habits.

Appellant sought to have its assistant secretary and claims officer testify to the effect that under appellant's practice at the time the policy was issued it would not have issued a policy in the case of an unfavorable personal history of drinking habits (R. 329). Appellant argues that the matter of drinking habits of a prospective insured is a material consideration affecting the question of whether an insurance company will assume the risk of insuring a particular life.

In view of the trial Court's finding that there was no misrepresentation by Mr. Houston concerning his drinking habits, the question of the company's underwriting practices with respect to unfavorable personal history of drinking habits is completely irrelevant. Appellee does not deny that generally a misrepresentation with respect to drinking habits may well be material, but in this case no misrepresentation was established.

The other question asked appellant's assistant secretary as to whether the company would have issued the policy had it known Mr. Houston's history of drinking habits was obviously improper not only because it erroneously assumed that misrepresentation

in this respect had been established but because it calls for a speculation, conclusion and opinion of the witness. Certainly the testimony of an officer of appellant as to what appellant would or would not have done under a state of facts not shown to exist is wholly improper.

III. THE TRIAL COURT CORRECTLY AWARDED INTEREST FROM MAY 4, 1954, THE DATE PROOF OF LOSS WAS RECEIVED BY APPELLANT.

Appellee was entitled to interest upon the amount found due from the date proofs of loss were submitted to the date of judgment. The policy sued upon provides:

“CLAIM. The amount due on the assured’s death shall be payable on receipt by the Company at its Head Office of due proof of such death * * *”

The family income provision provides for payment of a guaranteed income of \$200.00 per month, “the first payment to be due as of the date of assured’s death and subsequent payments to be due on the same day of each month thereafter during the remainder of the family income period, * * *”.¹⁴ Under these provisions there can be no question but that appellee was entitled to payment upon the date of receipt of proof of death at the company’s head office. It was

¹⁴The parties have stipulated, subject to the approval of this Court, that reference may be had to provisions of the insurance policy sued upon without printing the entire policy in the record (R. 699-700).

stipulated on the trial and the trial Court found that the "proof of loss and claim was dated April 16, 1954 and was filed with and received by said defendant Canada Life Assurance Company on said 4th day of May, 1954 and that said proof of loss and claim was in proper form, as required by said defendant in said Policy No. 1,003,546 and amendments thereto, and that said defendant raised no question as to the proof of loss from a technical standpoint and the only defenses urged in said action and at the time of trial were the affirmative defenses of said defendant, namely, the defense that the insured had committed suicide and had made misrepresentations as to the extent of his drinking in his application for insurance." (R. 73.) Appellee was therefore entitled to payment on May 4, 1954 under the terms of the policy.

Appellee's right to payment having accrued on May 4, 1954 it follows as a matter of statutory law that she is also entitled to interest from that date. California Civil Code, Sec. 3287, provides:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

See: *Happoldt v. Guardian Life Ins. Co.*, 90 Cal.

App. (2d) 386, 404;

Engelberg v. Sebastiani, 207 Cal. 727, 729-730.

California Civil Code, Sec. 1449, relating to a right of selection between alternative acts, has no bearing upon this situation. Obviously, if appellant had been making regular monthly payments since the date of death, as required by the policy, appellee could not have claimed for the commuted value computed as of the date of death, but appellee has received absolutely nothing under the policy. Moreover, in addition to stipulating that the proof of loss was filed and that there was no technical objection to it, counsel agreed that the commuted value of the policy and the amount properly involved in the action was \$28,552.00 (R. 94-95). Unless either of the appellant's two affirmative defenses were established, this amount was unquestionably due appellee on May 4, 1954. Under these circumstances, it is apparent that the trial Court correctly allowed interest at the legal rate provided by California statute from the date such amount was due to the date of judgment.

For the reasons hereinbefore stated, it is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,
September 7, 1956.

Respectfully submitted,

PHILIP H. ANGELL,

ROBERT M. ADAMS, JR.,

By ROBERT M. ADAMS, JR.,

Attorneys for Appellee.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

Charlotte H. Clayton (wife) (R. 381-382, 386, 407-8).

Q. I am not sure that I have asked you this question and you answered it, so I am going to state it again—ask the question again: Will you state, as nearly as you can to—tell us what was Mr. Houston's nature. Was he ordinarily a happy sort of person or a gloomy, melancholy person?

A. He was a happy person.

Q. Would you characterize Mr. Houston as an extrovert?

A. I would.

Q. Vigorous?

A. Very, very.

Q. Dynamic?

A. I would.

Q. And did Mr. Houston, as far as you observed, always enjoy the things that he was doing?

A. He loved life, he really did.

* * * * *

Q. Now referring, first, to your entire life with Mr. Houston as a wife, did you ever at any time during your entire life as a wife of Mr. Houston ever hear him state that he intended to or would take his life by his own hand?

A. Never.

Q. Now, that period just before Mr. Houston's death on February 22, 1954, did Mr. Houston make any statement to you of any kind, that he intended to take his life?

A. Absolutely not.

Q. Did he state anything to you as any reason which might cause him to take his life?

A. No, sir.

* * * * *

Q. And did you tell them that this approximate period of the year he had periodic periods of depression?

A. I said, "depression", possibly. I don't know what I said at that point. But I didn't mean by "depression" what your Dr. Bennett meant yesterday, I assure you.

Mr. Clausen. I ask the last portion go out as a voluntary statement, Your Honor.

The Court. It may go out.

Mr. Clausen. Q. Did you tell them at that time that your husband had been, during these periods, nervous?

A. I think I—I don't know, as I said, I was—you can imagine how I felt—I can't say I said this and I didn't say that. I can only say that I did not mean by "depression" what you felt I meant.

Mr. Clausen. Again ask that go out.

A. I meant preoccupied.

Mr. Clausen. Again, Your Honor, we ask the last portion go out as to what she meant.

The Court. The question and answer will stand.

Ann Houston Hanscom (daughter) (R. 427).

Q. Had you ever at any time in your life heard your father make any statement that he intended or was going to commit suicide?

A. Never.

Q. Did you observe your father's demeanor that weekend when you were home, as to whether he seemed to be his natural self, or did you see anything different about him than the usual way he looked or talked?

A. No, I didn't.

Q. Did he appear to be happy and about the same as he always was, at that time?

A. Yes.

Q. There was nothing that led you to be suspicious?

A. No.

Leroy Hanscom (patent attorney, friend for eight or nine years, father of Ann Houston's fiancé) (R. 457-458).

Q. Will you describe Mr. Houston's disposition, to the court, just as you observed him, as to what kind of a man he was?

A. Well, Mr. Houston was a very vigorous sort of man, a very genial—for example, when he greeted you you had no misgivings that you had been properly greeted. I don't think as far as I know, there was ever any fluctuation—he always seemed to be of an even temperament and always very jovial and congenial.

Q. Was he a nervous type of individual?

A. I wouldn't consider him so, no.

Q. You say he was a happy personality?

A. Decidedly so.

Q. Enjoyed talking politics?

A. He enjoyed doing anything. He enjoyed living.

Q. Sports?

A. Particularly sports.

Q. Active in his church?

A. Yes, he was.

Q. You observed Mr. Houston in his home life?

A. Certainly.

Q. Did you ever observe any discordant note in the family?

A. On the contrary, he was always—had a very affectionate nature toward both his wife and two daughters.

Q. All the years you knew Mr. Houston did you ever hear him make any statement whatsoever that he was going to take his own life or that he would commit suicide?

A. Never.

Donald C. Campbell (hunting companion for seven years)
(R. 468).

Q. Now, on these various trips that you would take, in all the time that you were with Mr. Houston, did you have an opportunity, and did you, Mr. Campbell, observe Mr. Houston's nature, his actions?

A. By all means, I certainly did.

Q. Now, would you say that Mr. Houston was ordinarily a happy man who enjoyed life?

A. He enjoyed it more than anybody I have ever met before or since.

Q. Did you ever hear Mr. Houston at any time or any place mention anything about taking his own life?

A. Why, absolutely not.

Ellen May Hoffman (confidential secretary for ten years) (R. 542).

Q. How would you describe Mr. Houston in his attitude and disposition around the office, just generally, Miss Hoffman?

A. Well, he was a very energetic man. He had a job to do and he felt that he must do it, and he did it very well; and he was very considerate of other people and I would say that he was a man with a heart.

Q. Would you describe him as a nervous person, or a man who took his work more or less in stride without too much worry or show?

A. No; he did things as he came to them and he didn't worry about them before he came to them at all. I mean he took one job and did his work in stride.

Bert W. Levit (attorney at law, who had handled legal matters for Mr. Houston's company) (R. 545-547).

Q. Will you in your own words state for the court and the record what you observed as to Mr. Houston's demeanor and attitude as you saw him through those years, as to whether he was a happy person or an unhappy person?

Mr. Clausen. Your Honor, my objection to this same kind of testimony has been made before. I won't remake it if it is understood it runs to this line.

The Court. Well, I allowed both sides considerable latitude in that respect to accommodate the case.

Mr. Clausen. All right, Your Honor. May it be understood my objection runs to this line?

The Court. Let the record so show.

A. Well, I would say that as between the two classifications of being a happy or an unhappy person, he always impressed me as being a happy person.

Mr. Angell. Q. Did you ever see Mr. Houston when you would call him depressed, melancholy or in a bad mental state?

A. No, sir, I never did.

Q. And would you describe Mr. Houston as an extrovert or an introvert?

A. Well, I wouldn't say that he was an extremist on either side. I didn't consider—there is nothing that I could put my finger on to say that I would consider him either one or the other.

Q. But when he was with the insurance group in these insurance company activities, did he seem to enjoy taking part in them?

A. Oh, very definitely. He participated in the normal business gatherings and in the normal social gatherings at these meetings, and so far as I was able to observe, no differently from anyone else.

Q. Did you ever hear Mr. Houston—

A. He was friendly, I would say that. He was certainly a very friendly person to those with whom he came in contact.

Q. Did you ever hear Mr. Houston express any desire or intent to commit suicide?

A. Never.

Harry A. Utley (close friend, hunting companion, business associate, known well for ten years) (R. 564).

Q. You had great opportunity to observe Mr. Houston, did you not, as to whether he was a happy person or an unhappy person?

A. Oh, yes.

Q. Would you describe for the court just how you could classify Mr. Houston with respect to whether he was depressed or morbid or a person worrying?

A. Well, he was always a very cheery person. He always had something doing. He was always active and he always had some plans on going sage hen hunting or duck hunting or deer hunting. He was a very cheery and thorough businessman.

Q. And did you ever see anything in the nature of a Dr. Jekyll and Mr. Hyde in Mr. Houston, would you say?

A. No, no.

Evans M. Taylor (attorney at law, legal advisor, business associate and social friend, known ten or twelve years) (R. 570-571).

Q. And did you have, would you say, a fair opportunity to observe Mr. Houston as to his nature and conduct, as to whether you would say he was a depressed man or a morbid man or a morose and melancholy man?

A. I did have a number of occasions to observe him, yes.

Q. And would you just state in your own language a word picture of how you would describe the characteristics of Mr. Houston with respect to his emotional moods?

A. Well, I would say he was essentially a very friendly person, a person who not only seemed to enjoy things and events but thoroughly enjoyed people, and an active person.

Q. Would you call him a depressed person?

A. Not in any sense.

Q. Did you ever see him depressed?

A. No, I wouldn't say that I ever saw him depressed.

Q. Did you ever see him morbid?

A. No.

Q. Did you ever hear him say he would take his own life or commit suicide?

A. No, sir, I never have.

Q. Did he ever express in any way a desire to remove himself from his environment?

A. No indication of that character in any respect.

Q. Did you observe him to be happy in his business life?

A. He seemed to be a thoroughly happy soul.

Q. And his wife and family?

A. Oh, yes.

Gilbert Wilkes (business associate, fellow Kiwanis Club member, known nine years) (R. 598).

Q. Did you ever hear him express his desire to get out of this life or out of his businesses?

A. I wouldn't think so, not with his personality.

Q. Did you ever hear him say that he might commit suicide or——

A. No, sir.

Q. ——or comment that people had a right to commit suicide?

A. No, sir.

Appendix B

Testimony of Charlotte H. Clayton (R. 385-386).

Q. Now, Mrs. Clayton, referring to Mr. Houston's use and consumption of alcoholic beverages. Did Mr. Houston take a drink?

A. Yes, he did.

Q. Did you observe his drinking in your home or when you were out with him?

A. I did.

Q. Would you just tell the court, in your own language, just what you observed with regard to Mr. Houston's drinking, and keeping it entirely within your own knowledge when he was with you?

A. Mr. Houston and I sometimes had a drink before dinner, sometimes sherry or beer, maybe a highball. Often when we went out where we were entertained we didn't drink at all. We very seldom went to cocktail parties. I never in my life saw my husband intoxicated, unable to drive, unable to talk or to conduct himself as a gentleman—not once.

Q. How long were you married to Mr. Houston?

A. I was married to Mr. Houston twenty-five and a half years.

Q. At any time in those twenty-five and a half years did you ever have occasion to criticize or complain to Mr. Houston of his conduct, within the home or elsewhere, because of his drinking?

A. No, sir.

Q. And did you ever see Mr. Houston ever drink by himself?

A. Never.

Testimony of Ann Houston Hanscom (R. 428-429).

Q. Now referring to your father's use of alcoholic beverages. Had you ever seen your father take a drink?

A. Yes.

Q. Will you just state in your own words to the Court about how you would describe your father's drinking, from time to time, say——

Mr. Clausen. Your Honor, we object to that as asking this witness to speculate. In other words, he is asking the witness to put an interpretation upon a habit, which is purely a conclusion or opinion of this witness.

Mr. Angell. I ask her to state what she saw.

Mr. Clausen. You asked her——

The Court. She may state what she saw, if anything.

A. He would take one or two or sometimes no drinks at all.

Mr. Angell. Q. And was there any time that you can recall when your father was not drinking anything?

A. Yes.

Q. When was that period, do you know?

A. I would say a year before his death.

Q. Did he ever tell you why he wasn't at that time?

A. He was on a fat-free diet, I believe.

Q. Trying to take off weight?

A. Yes.

Q. Did you ever, in all the years you lived with your father, all the trips you took with him, ever see your father intoxicated?

A. Never in my life.

Q. Did you ever see your father drink so much alcohol or where he had had so much alcohol that he was unable to drive his automobile?

A. Never.

Q. Or staggered?

A. Never.

Q. Or walked with uncertainty?

A. Never.

Q. Did you ever see your father when he had so much alcohol that he was not coherent in his speech?

A. No.

Q. And wholly rational in his speech? Did you ever see him in that condition?

A. No.

Testimony of Charlotte H. Gustafson (R. 450-451).

Q. Did you see how much your father drank at different times when you were out and around the home when he was present?

A. Yes.

Q. And will you just state in your own words what you observed of your father drinking and at such times as you observed it over the years as you knew him and when you saw him up until the time of his death?

A. Well, when he would come with my mother for dinner at my house we wouldn't have anything

to drink, and when we would go up to their house for dinner sometimes we would have something to drink, sherry or beer or a highball before dinner, sometimes nothing. I can positively say that I never saw him intoxicated in my life, ever.

Q. Did you ever see your father in a condition from drinking alcohol where he would be high or couldn't walk straight?

A. Never.

Q. Or couldn't talk coherently?

A. Never.

Q. Or what you would call drunk?

A. Never.

Q. Or intoxicated?

A. Never, no.

Q. Did you ever hear your mother, your sister, yourself—did you ever have reason to complain to your father about his drinking?

A. No.

Testimony of Leroy Hanscom (R. 456-457).

Q. Now, over the years that you have known Mr. Houston, from time to time have you been places where Mr. Houston was drinking?

A. In my home and in his home.

Q. Will you just tell the court in your own words about the extent of drinking, on those occasions when you were present and you saw?

A. Well, in my home it was the usual practice to ask a guest if they wanted a cocktail, a drink of any kind, and we would have one round, and if any

of them wanted to they would feel free to take it. That would be about the extent of it there.

In the Houston home about the same thing occurred. I know they oftentimes preferred beer to whisky. As a matter of fact, I distinctly recall that we celebrated the two preceding New Year's with them and when the whistles blew at midnight, why, it was a can of beer that we celebrated with.

Q. Have you at any time ever seen Mr. Houston intoxicated?

A. I have never seen him intoxicated.

Q. Have you ever at any time in your long acquaintance with him ever seen Mr. Houston under the influence of alcohol to the point where he was not coherent and entirely clear in his speech?

A. I have never seen him where—even when he has had a drink or two—that it seemed to make a particle of difference to him.

Testimony of Donald C. Campbell (R. 468-469).

Q. You saw Mr. Houston's drinking habits, did you not?

A. Yes, I certainly did.

Q. And will you just tell the court in your own words what you saw as to Mr. Houston's drinking habits and on these various trips and hunting, when you were with him socially, just what you observed.

A. Well, he would have a drink with everybody else and along with everybody else, but by no means, he was not an alcoholic by any way that you could picture him. He was—he just was a social—would drink right along with the crowd and very—

and up to a certain point, and he would cut off. He had a big responsibility and we were with businessmen under him on practically on all trips and he couldn't afford to——

Mr. Clausen. Your Honor, we will ask the last part go out.

Mr. Angell. We have no objection to it going out.

The Court. What he could afford to or not to do may go out.

Mr. Angell. Q. Did you ever see Mr. Houston on any of these trips under the influence of liquor?

A. By no means.

Q. And did you ever see him when he was unsteady on his feet or incoherent in his speech?

A. Why, certainly not.

Q. Did you ever see him when he couldn't drive his car with safety?

A. Why, I wouldn't go out with him if I thought that it was unsafe.

Testimony of Bert W. Levit (R. 547).

Q. And did you observe Mr. Houston's drinking habits at the time he was with you and that you saw him?

A. Well, I can't—I can't say specifically that I remember ever seeing him take a particular drink. I certainly would have observed it had he not taken a drink when other people were drinking, because I have seen him at these meetings when people were having a few drinks and I observed no difference between Mr. Houston's habits in that regard and the others. And I observed that these people were

all quite sober people. In other words, I never saw Mr. Houston at any time under the influence of liquor in any degree.

Testimony of Ellen May Hoffman (R. 552-553).

Q. You had a chance to observe Mr. Houston's drinking habits?

A. Yes.

Q. Where would you be on occasions?

A. Oh, well, there were various social occasions, such as Christmas parties or maybe company banquets, something like that.

Q. And at such times as you ever saw Mr. Houston drink, would you state in your own words how many would you say he took?

A. Oh, he might have one or two drinks, maybe three.

Q. Did you ever see him intoxicated?

A. No, I have never seen him intoxicated and never seen him to the point he couldn't handle himself.

Q. Did you ever see him when he couldn't walk straight or talk straight?

A. No, I never did see him falter in his walk or hear him falter in his speech.

Testimony of Harry A. Utley (R. 566-567).

Q. And all the years that you knew Mr. Houston had you ever seen him drunk?

A. No.

Q. Did you ever see him under the influence of liquor to the point where he staggered or was incoherent?

A. No. We had social drinks together but he always could handle himself with wonderful shape. I never saw him where he couldn't.

Testimony of Evans M. Taylor (R. 573).

Q. And before we go into the events that occurred there, I would like you to state in your own language, if you can, the drinking habits of Mr. Houston as you observed them over the last four or five years before his death?

A. I would say that his habits were habits of social drinking. I have never seen him intoxicated and I have never seen him in a position where he did not appear to have all his faculties.

Q. And you went to many, many cocktail parties, did you not, and at these meetings with these insurance people?

A. Quite a few.

Q. Did you ever see him intoxicated at any of those?

A. No.

Q. Did you ever see him when he didn't have full control of his mental capacities or ever talked incoherently?

A. No, sir.

Q. Or did you ever see him where he couldn't drive his car?

A. I have not.

Testimony of Roger Gustafson (R. 590-591).

Q. During the years that you knew Mr. Houston from 1947 up to the date of his death on February 22, 1954, had you ever been on social affairs or in the home when Mr. Houston was taking any alcoholic drinks?

A. Yes, sir.

Q. And did you observe his drinking?

A. Yes.

Q. And could you very briefly and quickly summarize how you would describe the drinking of Mr. Houston and the number of drinks?

A. Well, at times—there would be times when he wouldn't take any at all; for instance, when he would come to my house for dinner, we wouldn't have any because I couldn't afford it; so at those times he wouldn't have any at all. Other times I would see him take I will say no more than three.

Q. Have you ever, in the years you have known Mr. Houston and been in his home and attended social functions, ever seen Mr. Houston drunk?

A. No, sir, I have not.

Q. Have you ever seen him with so many drinks aboard that he was incoherent or was not able to walk straight?

A. Definitely not.

Q. Have you ever been with him when he had drunk so much alcoholic beverage he could not talk coherently?

A. No, sir, never.

Q. Or show any signs of the influence of alcohol?

A. Never.

Q. Or drive?

A. Never.

Testimony of Gilbert Wilkes (R. 598).

Q. Now, before we get into that meeting, were you at a number of social affairs at which Mr. Houston was present, through the years of your association with him?

A. Oh, I had been to quite a few with Mr. Houston.

Q. On those occasions did you observe Mr. Houston's drinking habits?

A. He was always reasonable, conservative. As far as to my recollection, Mr. Houston could handle his liquor, as far as whatever he drank. He was never obstreperous; he was always courteous, and he knew what he was doing at all times.

Q. Did you ever see him drunk?

A. Well, certainly not.

Q. Did you ever see him—what you would say was under the influence of alcohol?

A. No, sir. Mr. Houston was normally a very happy person and very cheerful. People liked to be around him.

No. 15,102

In the
United States Court of Appeals
For the Ninth Circuit

THE CANADA LIFE ASSURANCE COMPANY, a
corporation,

Appellant,

vs.

CHARLOTTE S. HOUSTON,

Appellee.

Appellant's Reply Brief

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FILE

SEP 28 1964

PAUL P. O'BRIEN



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In the
United States Court of Appeals
For the Ninth Circuit

THE CANADA LIFE ASSURANCE COMPANY, a
corporation,

Appellant,

vs.

CHARLOTTE S. HOUSTON,

Appellee.

Appellant's Reply Brief

I. COMMENT ON APPELLEE'S STATEMENT OF THE CASE

Appellee has left out of her "Statement of the Case" several highly important facts. These are a few of the appellee's more glaring omissions:

1. A rifle is fired by squeezing or pushing the trigger.

2. The appellee admitted to the police that her husband had periods of depression and had been depressed lately (R. 49, 114).

3. The deceased was careful with guns (R. 411, 488).

4. The deceased had been borrowing increasingly upon his life insurance policies (R. 399-401).

5. At the time of the fatal shot, the rifle must have been standing upright, practically vertical to the floor (R. 517).

6. The deceased was bent slightly more than parallel to the floor at the time of the shot (R. 517, 518).

7. The muzzle of the rifle was pointed at his heart area, and was *within one inch* of his chest (R. 517).

8. Deceased kept his guns loaded with cartridges in the magazine, not in the chamber (R. 485).

9. The testimony respecting (a) the condition of the gun lever action, and (b) the possibility of firing by striking on the floor or hitting the hammer spur, related to a day more than a month after the death, and after the gun had passed through several hands.

II. COMMENT ON APPELLEE'S "QUESTIONS PRESENTED"

Appellee attempts in her "Questions Presented" to confine the issues on this appeal to the question of burden of proof. But this is a *reductio ad absurdum*. A vital point raised by this appeal is that the trial court forced appellant to shoulder an impossible burden of proof and at the same time erroneously admitted appellee's evidence and excluded appellant's evidence. A more apt list of questions presented is:

1. Did the trial court demand of appellant's case more than the law required to prove suicide?

2. Are the physical facts consistent with suicide and inconsistent with any *reasonable* hypothesis of accident?

3. Did the trial court commit prejudicial error in excluding appellant's evidence?

4. Did the trial court commit prejudicial error in admitting over objection appellee's evidence?

5. Was appellee entitled to interest as damages upon the full amount of commuted value as of May 4, 1954, or upon the installments of family income due then and until the date of judgment, or at all?

III. COMMENT ON APPELLEE'S ARGUMENT

A. Appellee Misunderstands Appellant's Contention That the Trial Court Misapplied the Law of Burden of Proof. Appellant Was Referring to the Burden of Producing Evidence, Not to the Burden of Persuasion. The Trial Court's Memorandum Opinion Demonstrates That the Trial Court Erroneously Required Appellant to Produce Evidence of a Precise Motive for Suicide and to Disprove with Evidence any Theory of Accident. The Law Makes No Such Impossible Demand of Appellant.

There is no argument over the question whether appellant had the burden of proof on its two affirmative defenses. There is argument, however, over the scope and extent of that proof. "The term 'burden of proof' is used in different senses. Sometimes it is used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of the evidence." *Estate of Hampton*, 55 C.A. 2d 543, 564. Appellant does not deny that its burden was to produce evidence preponderantly showing suicide. See appellant's brief pages 32, 33. Appellant of course contends that it satisfied this burden. But the trial court concurrently demanded that appellant not only persuade but actually produce evidence showing the precise reason why deceased committed suicide and produce evidence refuting any theory of accident urged by appellee whether supported by evidence or not.

Appellee suggests that the trial court imposed no such burden upon appellant. But, the court did say, "If the court was of the view that the evidence presented spelled out but one conclusion, namely, suicide, it would not hesitate enter-

ing judgment for defendant herein" (R. 46). And the court did say, "The plaintiff on the other hand has suggested several ways in which the shooting may have taken place, all as a result of accident" (R. 46). And the court did say, "The court cannot, in view of the physical evidence in this case, and the lack of proof of suicidal motive on the part of insured, come to the conclusion that defendant insurance company has shown by a preponderance of the evidence that insured committed suicide" (R. 52). The implication is clear: The trial court would have required defendant to prove *with evidence* the motive for suicide and to disprove *with evidence* the "several ways," i.e., mere possibilities, of accident suggested by appellee.

Appellee suggests that appellant's statement of its burden of proof lacks common sense and is contrary to authority (B. p. 19-20). But, this is self refuting. The most recent California authority, *Long v. Cal.-Western States Life Ins. Co.*, 43 Cal. 2d 871, 882, clearly shows that mere preponderance of the evidence of suicide is all that the California courts require; that it is the function of the trier of fact to pick between a theory of suicide and theories of accident *which are supported by evidence*, and not to reject the former because of the existence of the latter which may not be supported by evidence. Note that in the *Long* case the California court states that preponderance of the evidence is all that is required (p. 882); that the court cites *Burkett v. N. Y. Life Ins. Co.*, 56 F.2d 105, 107-108 (p. 883), where the court rejected a theory of accident, saying, "That the firing was so caused is a mere possibility supported by nothing shown by the evidence"; and that in the *Long* case the theory of accident was supported by some competent evidence. "It was plaintiff's theory that the deceased had arisen from bed in response to the barking of the dogs, that

as he went on the porch to investigate, he stumbled over a chair or tripped on an outstretched string, and in falling the gun which he was carrying was accidentally discharged, with the bullet entering his forehead. Several witnesses testified that after the shooting they found a chair overturned in the vicinity of where the deceased fell and a string tied between the leg of a chair and a porch post near the front door of the house; and there was testimony that one of the little boys had put the string there during play that day" (p. 875). With this and other evidence in the record, the court then said: "The issue was thus sharply defined for the jury's evaluation of the *physical evidence* in determining whether the bullet entered the forehead consistent with plaintiff's theory of accidental death or entered at the temple consistent with defendant's theory of suicide" (p. 877). No California court has held that the insurance company must disprove hypotheses of accident not supported by reason and evidence. No California court has held that the suicidal motive is a *sine qua non*.

This is not to say, however, that appellant concedes a failure to prove motive or to disprove theories of accident. On the contrary, there is sufficient evidence of motive, and appellee's theories of accident fall of their own unreasonableness and lack of evidentiary support.

B. A Most Important Physical Fact in the Case Is That a Rifle Is Fired by Squeezing or Pushing the Trigger. That Fact, Coupled with the Other Physical Facts, Makes an Inference of Suicide Conclusive, Even Assuming There Were Competent Evidence That the Rifle Could Fire Due to a "Jar."

Appellee contends that a variety of "facts and circumstances" create an insufficiency of evidence to prove suicide (B. p. 21), and cause inconsistency with a theory of suicide and consistency with a theory of accident (B. p. 31). These

"facts and circumstances" are what the court in *Walker v. Phila. Life Ins. Co.*, 127 F. Supp. 26, 30, termed the "bizarre facts," such things as the jovial disposition of the deceased, his good humor the night before, his future plans, etc. But here, as in the *Walker* case, where the evidence shows that death was not accidental, the fact that there may be some evidence which, standing alone, seems inconsistent with a suicidal *intention* will not detract from the *conclusive proof of physical facts*.

Appellee claims that the physical facts present no theory whatsoever (B. p. 22). Appellant, on the other hand, contends that the physical facts are conclusive. Of these, the most important is that a rifle is fired by squeezing or pushing the trigger. This fact is so obvious that it tends to be overlooked. Certainly the trial court overlooked it. For, when a man shoots himself by rifle shot, the man being customarily careful with guns, and this occurs while he is bent horizontally over an upright rifle, the muzzle pointed at the heart and within one inch of the chest, the fingers accessible to the trigger, it is completely unreasonable to assume that the trigger was squeezed or pushed accidentally or intentionally in jest. The inference of suicide is the only *reasonable* inference. "The possibility of death by accident is excluded by the nature and location of the wound." *New York Life Ins. Co. v. Alman*, 22 Fed. 2d 98.

Appellee complains that the deceased's fatal position was cramped and awkward. This, too, is an important fact. It shows again the intentional nature of the act. Having already stooped slightly, at the place of the shooting, the deceased naturally for the second or so would have bent further over the gun, rather than stand upright and hold the gun in front of him in the crowded passageway, as suggested by appellee (B. p. 34). Furthermore, one would not,

under such circumstances, and for no reason have assumed a still more cramped and awkward position except *voluntarily*. By so positioning himself, we infer the deceased only could have contemplated suicide. The series of backtracking inferences (B. p. 22), that he knew the rifle was loaded and cocked (recall he kept his guns loaded with shells in the magazine, not the chamber), when he squeezed or pushed the trigger are again the only reasonable inferences. What he did thereafter was pure reflex.

Consider the only other alternative posed by appellee. From her evidence that the rifle could be fired by striking it upon the floor appellee argues that the death could have occurred by the deceased's falling over a gun thrust upon the floor in order to support himself (B. p. 36). There is a most obvious error in this theory. To assume that a person would support himself with a lethal weapon by pointing it at his heart and within one inch of his chest, without suicidal intentions, is completely unnatural (B. p. 36). Certainly it would not be done voluntarily. And certainly every instinct would cause the deceased to have pointed the gun elsewhere if it had been done involuntarily. Moreover, the theory does not gibe with any physical facts. The indentation made in the floor was similar to indentations made when the rifle was *resting* upon the floorboard and the trigger *intentionally* pulled (R. p. 511). The shot occurred in the middle of the passageway; there was nothing there which could have caused the deceased to stumble. There was no evidence of an accidental stumble. The deceased was careful with guns and was an experienced hunter. As such he never would have carried a gun by the muzzle but would have held the rifle pointed down with the butt resting under his armpit. Even had the deceased stumbled, the probable way to have supported himself would have been to grasp onto some of

the surrounding furniture, rather than tumble over a rifle that might have been loaded. In order to avoid harming any member of his family, he would naturally have fired the shot near a wall rather than in the middle of a room. Like considerations for his family would have caused him to aim at the heart rather than disfigure himself by blowing his brains out. The same considerations for his family would have caused him, an insurance man, to leave no traces of suicide, such as suicide notes, so as to preserve insurance monies. But most important of all, had the deceased stumbled, his natural reaction would have been to bend his knees, throw back his head, and throw out his arms, making the infliction of the fatal wound completely improbable. "Where a person trips, the normal movement is to throw out the hands to break the impending fall." *Long v. Cal.-Western States Life Ins. Co.*, 43 Cal. 2d 871.

In short, appellee's hypothesis is, in the light of the physical facts, completely improbable; it is unreasonable, and does not suffice to support the presumption against suicide as against the conclusive inference of suicide. See all the cases cited by appellant in its opening brief, page 47.

Appellee's hypothesis also is unlike those presented in her cited cases. It is supported by no evidence and is contrary to the evidence. Thus, unlike *Prudential Ins. Co. of America v. Baciocco*, 29 Fed. 2d 966, where all that was known of the death was that the deceased was found drowned beneath a cliff, here the manner of death is known. Unlike *Wilkinson v. Standard Acc. Ins. Co.*, 180 Cal. 252, there was no physical evidence whatsoever to show that the fatal weapon was fired by an accidental striking. Unlike *Beers v. Calif. State Life Ins. Co.*, 87 C. A. 440, there is no possibility here that the insured had bent over the rifle, pointed it at his heart, and pushed or squeezed the trigger

due to *mistake*. Unlike *Brooks v. Metropolitan Life Ins.*, 27 Cal. 2d 305, there was no conflict in the evidence over the location or position of the agency causing death, one line of testimony supporting a theory of accident, the other a theory of suicide. Unlike *Jenkin v. Pacific Mut. Life Ins. Co.*, 131 Cal. 121, where the sole facts upon which the court was to decide accident, murder or suicide was the bullet wound which caused death two days after it was inflicted, here the position of the body is known, the direction of the bullet is known, not only with reference to entrance and exit, but also with reference to the floor, and the position of the fatal weapon is known.

The court in the *Jenkin* case spells out a distinction in the presumption against suicide. It operates only "when nothing more is shown than that [death] was brought about by a violent injury, and the character of such injury is consistent with the theory of accident." Appellant's proof here of course showed more than violent injury, and the character of the injury is not consistent with a theory of accident.

C. Bearing in Mind That a Rifle Is Fired by Squeezing or Pushing the Trigger, a Most Important Physical Fact in the Case, and That Appellee's Theory of Accident Is Based on the Supposition That the Rifle Could Have Fired by Striking It Upon the Floor, the Prejudicial Character of the Trial Court's Error in Allowing Testimony Concerning the Ballistics Tests Is Conclusively Established. Nor Was the Error Waived as Claimed by Appellee.

Appellee argues that the error in admitting evidence concerning the ballistics tests was not prejudicial! (R. p. 42) Appellee refers to the trial court's self-serving statement that it would have reached the same conclusion regardless of such testimony. But, as pointed out in appellant's opening brief, the trial court relied upon that testimony. And its prejudicial character is conclusively shown by the

fact that the only theory presented in appellee's brief is based upon that testimony, and by her own admission on page 35: "The fact that the gun could be accidentally fired distinguishes this case from the many cited by appellant."

Nor was the error waived. Appellee asserts a "confession and avoidance" argument of waiver, thus conceding the erroneous and damaging nature of her expert testimony. Appellee claims such a waiver from the fact that appellee's witnesses were cross-examined (B. p. 42). Her cited cases of course do not so hold. The correct rule is set forth in *Moore v. Norwood*, 41 C.A. 2d 359, 369:

"Neither does the fact that appellant cross-examined respondents' expert witnesses deprive the former of the benefit of his objections made at the trial, nor does such action militate against him on appeal. The rule in this regard is thus succinctly stated in *James v. Tully*, 178 Cal. 380, 384 [173 Pac. 577]:

"By the presentation on his own part of such independent proofs the objecting party, of course, waives his objection and point on appeal; not so, however, when the objecting party undertakes to exercise his right to cross-examine a witness as to statements to which he has erroneously been permitted to testify. Were it otherwise, one of the main functions of cross-examination would be most seriously impaired; for a party after rightfully objecting to the admission of evidence, may by his cross-examination lay the foundation for an obviously proper motion to strike it out, or may compel its contradiction or withdrawal, or may utterly destroy its effect, and thus render unnecessary his remedy by appeal from the court's erroneous action.'"

Nor was there waiver by failure to make the proper objection. Appellee erroneously states that appellant's objection was limited to the objection that the testimony would be speculation and would not be the proper subject of expert

testimony (B. p. 40). Appellee claims that for the first time on appeal, appellant raises the objection that there was lack of foundation (B. p. 42). Appellee is wrong. One ground for its motion to strike was that the tests were “not conducted under circumstances similar to the death of deceased,” and at the time of the initial objection, appellant’s counsel objected on the ground that, “There is no showing here that these various tests involve the way the gun was discharged at the time of the shooting” (R. 507).

The tests were not similar. One essential dissimilarity was that it was not shown by appellee that on the day of the tests the gun’s condition was similar to its condition more than a month previous. It had since passed through the hands of the deputy coroner, police and Dr. Kirk. Another is that the cartridges were not similar, since the bullet and powder had been removed, and there was no testimony that their removal would not make a difference in results. Another is that there was no testimony as to the height from which the rifle was dropped, nor as to the amount of force or speed with which the gun was struck, and that it was possible timewise or otherwise for the deceased to have ended up in his slightly more than horizontal position after having dropped the gun with sufficient force or distance or speed to have caused the gun to fire. And finally no testimony was given showing that the type of surface against which the butt was struck was similar to the floor in deceased’s basement.

It does the appellee no good to use the semantic argument that her expert’s testimony did not relate to experiments but merely to the description of the mechanical operation of the gun (B. p. 40). Her experts testified that they “tested” the rifle (R. 507), and the very case cited by appellee, *People v. Willis*, 70 C.A. 465, (which did not involve tests to prove

a mechanical defect) talks of "experiments which were made with the gun" (p. 472). And appellee herself refers to them as "tests" (B. p. 40).

The simple fact is that appellee's experts experimented with the gun, and appellee failed to show that the experiments were conducted under circumstances and conditions similar to the time, place or manner of death of the deceased. *McGough v. Hendrickson*, 58 C.A. 2d 60, holds it was her burden so to do. It was an abuse of discretion for the court to admit the testimony; and in any event her failure to lay such a foundation, particularly respecting the condition of the gun, emasculates its value as evidence. The failure of appellee to support her position with any case in point, and her reliance upon a purported waiver, is an implied concession that the evidence was inadmissible.

D. The Exclusion of Appellant's Evidence on Suicidal State of Mind Was Prejudicial Error.

Appellee argues that the adjuster's report, erroneously excluded from evidence, was too remote in time, and was not made in the scope of the adjuster's authority as agent of the deceased because the agent represented the liability insurance carrier (B. p. 25). The short answer to the latter argument is that the adjuster was acting in a dual agency capacity, as agent both of the deceased and of the liability carrier. For example, the release secured by the adjuster was for the deceased and released rights as against the deceased. That an adjuster's declarations in connection with the adjustment of a claim are admissible hearsay as against his principals is too clear for argument. See *State Farm Mut. Auto. Ins. Co. v. Porter*, 186 Fed. 2d 834 (9th Cir. 1950), where the adjuster's statements and admissions of the attorney representing both the tortfeasor and insurance

company were held to be admissible, originally in the negligence action, and then later in an action on the policy.

On the question of remoteness, it first should be noted that appellant's objections to letters of the deceased antedating the adjuster's report were overruled by the court below (R. p. 481). Second, appellee's conclusion that the matter was "laid to rest" is merely her inference from evidence presented by her to the effect that persons other than deceased had had no communication with the prostitute referred to in the report. The question of admissibility of appellant's evidence is not determined by its conflict with appellee's evidence. Third, both the feelings of remorse which the deceased presumably suffered and the intention of the prostitute to make good on her "fine position" undoubtedly did not disappear in the space of a few months. "A state of mind once proved to exist is presumed to remain such until the contrary appears." *Smith v. Capital Gas Co.*, 132 Cal. 209, 212. Finally, it should be noted that the Lakeview incident was but one, although an integral part, of a pyramiding effect of appellant's evidence showing a suicidal state of mind and should be added to appellant's other evidence of periods of depression, cyclothymic personality, running and increasing debts, etc.

Appellee also seeks to avoid the prejudicial error which occurred in the exclusion of Dr. Bennett's expert testimony (B. p. 26). Again appellee would choose to determine the admissibility of appellant's evidence by her inferences and deductions from other evidence. Appellee's claim that the question assumed facts not in evidence or failed fairly to represent the evidence presupposes that appellant's hypothetical question was required to be based on appellee's evidence alone. But "It is not essential to the propriety of a hypothetical question that the facts assumed should be

undisputed. The question is proper if it recites only facts within the possible or probable range of the evidence and if it is not unfair or misleading." *Guardianship of Jacobson*, 30 Cal. 2d 312, 324. Appellant's evidence, especially the testimony of appellee and witness Wilkerson, established each of the facts stated in the hypothetical question, and the question was therefore proper.

Again, appellee claims that the exclusion of Dr. Bennett's testimony was not prejudicial. But the best refutation is her brief. It is replete with the very conclusions which our proffered testimony was designed to rebut. For example, on page 38 she asserts that her evidence showed "that insured was not the kind of person to destroy himself." On page 39 she talks of "the evidence of insured's character and circumstances which unerringly show a positive intention to continue to live." It was for this reason that the appellate court in *Smith v. Metropolitan Life Ins. Co.*, 47 N.E. 2d 330, 333, held that the alienist's testimony should have been admitted, to rebut the effect of "evidence that he was in good health, happily married, cheerful on the morning of his death," etc. Appellant should have been given the opportunity to show that appellee's uninformed conclusions, *supra*, were, to an informed expert, incorrect. Appellant had a right to submit its theory of the case by a hypothetical question without adopting any part of its opponent's theory. *Coogan Finance Corp. v. Beatcher*, 120 C.A. 278.

And, finally, appellee's complaint that Dr. Bennett had not examined the deceased is merely a complaint against all expert testimony. The case "is governed by the established rule in California that a duly qualified expert witness may express through an answer to a hypothetical question an opinion upon a subject of expert testimony." *Ver Bryck v. Luby*, 67 C.A. 2d 842, 845.

E. The Exclusion of Appellant's Rebuttal Opinion Evidence Was Prejudicial Error.

Appellee asserts that her experts expressed no opinion as to the cause of death (B. p. 40). But the record (R. 515, 529) will disclose they did so in response to appellee's questions. The above assertion and her attempt to characterize their testimony merely as description of the mechanical operation of the gun clearly shows recognition that error was committed below. Notwithstanding her statement to the contrary (B. p. 41), *People v. Heacock*, 10 C.A. 455, is directly in point in holding that the admission of such testimony as to possibilities of accident is prejudicial error. So also would be the admission of the Coroner's jury verdict. Its only conceivable relevancy would be as the hearsay opinion of the jury that there was a possibility of accidental death. Therefore, the trial court, having allowed appellee to introduce inadmissible opinion evidence, should not have compounded the error by excluding the more authoritative opinions of the police and coroner. They were the ones who talked to appellee and were thus better qualified to judge the meaning of her admission that the deceased had periods of depression and was depressed lately. They were the ones who were on the scene minutes after the shooting and were able to observe the undisturbed physical evidence and condition of the premises. They were the ones with authoritative experience who had made innumerable determinations of suicidal death.

F. Appellee Fails to Answer Appellant's Argument on Its Misrepresentation Defense.

Appellee relies upon *McEwen v. New York Life Ins. Co.*, 42 C.A. 133 (B. p. 44) for its holding there that the question whether the insured had used alcohol to excess was a question of fact, and claims that the evidence thereon is in conflict

(B. p. 45). But, in the *McEwen* case, as the court there notes, "There is little testimony touching the quantity of his libations." The importance of the *McEwen* case is that it states the appellant's burden of proof below: To prove habitual use, and that on only more than one occasion the insured drank to excess. Appellant claims that this burden was fully satisfied. Being under the influence of alcohol most of the time, as witness Wilkerson testified the deceased was, appellant submits, is drinking to excess. That some friends and his family did not observe this activity is not a conflict of evidence. That these same friends and family testified that the insured drank is proof of habitual use.

In any event, appellee utterly fails to dispute the holdings of *Allstate Ins. Co. v. Miller*, 96 C.A. 2d 778; *Maggini v. West Coast Life Ins. Co.*, 136 C.A. 472, and *Cal.-West. States Etc. Co. v. Feinsten*, 15 Cal. 2d 413, cited by appellant in its opening brief, which clearly demonstrate the error below of excluding appellant's evidence on materiality of the representations. Appellee contents herself with arguing, without citation of authority, that the testimony was improper and that the error could not have been prejudicial because the trial court found that no misrepresentations had been made (B. p. 47). But the error should be considered with reference to the evidence and the numerous other erroneous rulings on admission and exclusion of evidence, and when so considered, the error must be deemed prejudicial. See *Stinson Co. v. Lemoore Co.*, 45 C.A. 241, 256.

G. Appellant Did Not Waive Its Right to Object to the Award of Interest. Both in Its Answer, and in Its Requests for Findings, Appellant Denied That Appellee Was Entitled to Interest on the Full Commuted Value as of May 4, 1954. Nor Did Appellant Stipulate Away Its Right so to Object.

Appellee argues that appellant stipulated away its right to object to an award of interest, because of the following

language: "We will take the stipulation that the proof of loss was duly filed and no objection was made to that proof of loss, other than those stated in the two separate defenses in the answer * * *" (R. 330; B p. 49) Obviously the stipulation makes no reference to an award of interest, and, in fact, the objection was raised at the first opportunity afforded appellant so to do, at the time of settlement of findings and judgment (R. 54). Appellant's answer denied that appellee had any rights to the commuted value (R. 33).

Appellee nowhere explains how her damages could have been certain on May 4, 1954, without first having given notice to appellant of her election to choose either the family income or commuted value. Thus under the clear terms of *Calif. Civ. Code* § 1449 and § 3287, no interest should have been awarded upon the commuted value as of the due date of payment. Furthermore, it is questionable whether interest should be allowed to date of judgment upon the accrued amounts of family income, due to the same uncertainty. In any event, § 1449 vests the right of selection in the appellant, and the latter amount of interest is the least erroneous.

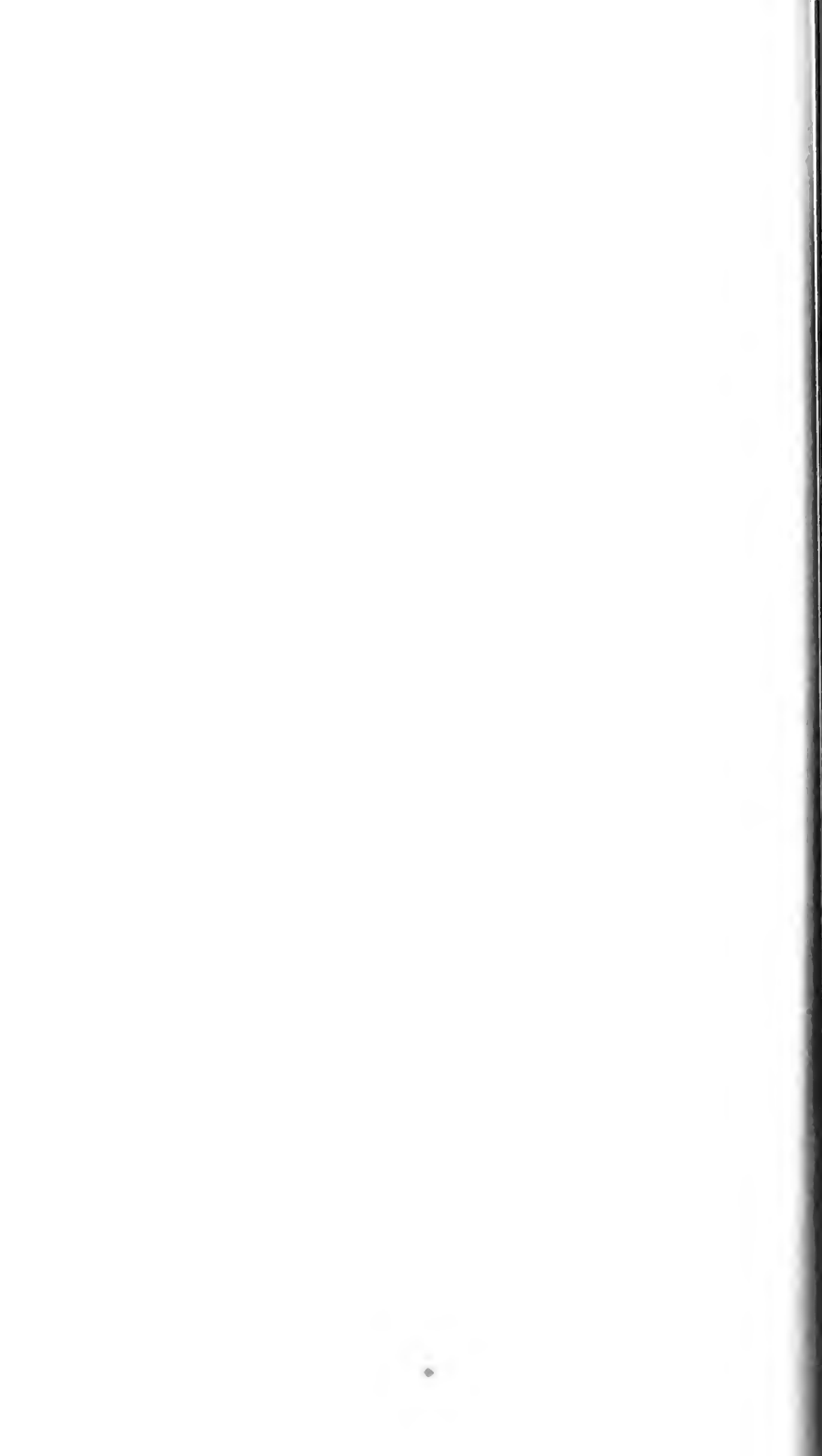
CONCLUSION

WHEREFORE, appellant respectfully submits that the judgment should be reversed for all the foregoing reasons.

Respectfully submitted,

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No. 15103.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN IRWIN ROBERTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 15103.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN IRWIN ROBERTS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant was indicted by the Grand Jury for the Southern District of California on October 12, 1955, on two counts of perjury and one count of obstruction of justice [Clk. Tr. 11].¹

On October 25, 1955, appellant was arraigned and entered a plea of not guilty to all three counts of the indictment and the case was set for trial on January 10, 1956 [Clk. Tr. 12].

On January 10, 1956, jury trial was begun in the United States District Court for the Southern District of California, the Honorable Judge Ben Harrison presiding [R. 3].² The trial was concluded by a verdict of guilty on all three counts on January 13, 1956 [R. 481].

¹"Clks. T." refers to Clerk's Transcript of Record.

²"R" refers to Reporter's Transcript.

On January 30, 1956, it was adjudged that appellant be committed to the custody of the Attorney General for a period of three years on each of the three counts, the sentences to run concurrently [R. 499; Clk. Tr. 43-44].

On February 2, 1956, a timely notice of appeal was filed [Clk. Tr. 47], and on February 8, 1956, the District Court ordered that the appellant be allowed to proceed *in forma pauperis* [Clk. Tr. 50].

The District Court had jurisdiction of this cause of action under Title 18, United States Code, Sections 1503, 1621 and 3231.

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291 and Rules 37 and 39 of the Federal Rules of Criminal Procedure, Title 18, United States Code.

Statement of Facts.

Appellant was hired by Builders Control Service, Inc. in June, 1948 to liquidate certain property of the corporation in San Diego County [R. 49, 52]. His starting salary was \$300 per month, but this was later raised to \$400 [R. 49]. No written contract was entered into and no compensation in addition to his salary was given or promised him [R. 49]. The appellant was fired from his position in March, 1951 [R. 49]. On May 23, 1952, he filed a civil action against the corporation and others alleging that they were indebted to him in the sum of \$477,805.00 for services rendered by him pursuant to a written contract [R. 78, 81]. The written contract was alleged to have been taken from him by fraud, etc. [R. 76].

Various depositions were taken in the civil action, and the cause went to trial in October, 1954, the case

ultimately being dismissed for lack of prosecution [R. 7-8, 452]. Various statements of the appellant under oath during the depositions and at the time of trial were the bases of the grand jury's indictment for perjury.

The first count of the indictment charged that appellant perjured himself in a deposition on September 8, 1952 in that he falsely stated there was such a written contract by which he was to receive \$100 per week as a retainer fee, \$100 for each day he worked, and a participating interest in certain transactions [Clk. Tr. 3-5]. The second count of the indictment charged that appellant similarly perjured himself on October 5, 1954 at the trial of the civil action in that he again falsely stated that there was such a written contract [Clk. Tr. 5-10]. Count three charged the appellant with endeavoring to obstruct justice in that he solicited one Gladys Dutcher to perjure herself in a deposition in the civil action [Clk. Tr. 10-11].

Three officials of the corporation testified in the trial below that no such contract, written or oral, had ever existed [R. 49-50, 122-123, 128]. Gladys Dutcher testified that she was requested by the appellant in two conversations to falsely testify that she had seen the written contract and related papers, or so-called "credit memoranda" [R. 192-193, 199-201]. Tape recordings of these conversations were introduced into evidence [R. 327-340, 343-348, 367]. Two former secretaries of the corporation testified that appellant had requested them to testify that they had seen the contract in question [R. 163-165, 179].

Two defense witnesses testified that, in 1950, they saw what appellant contended to be a written contract and credit memoranda between Builders Control and himself [R. 239, 257]. Another witness testified that he saw papers similarly represented by appellant to be said con-

tract and memoranda in 1953 [R. 387], three years after appellant asserts they were taken from him [R. 76, 280].

The appellant testified that there was such a written contract [R. 268], and was allowed to summarize the types of activity in which he was engaged with the corporation [R. 272-277]. He was not permitted by the trial court to testify to the precise, minute details of his duties with the corporation [R. 277].

Summary of Argument.

I.

LIMITATION OF THE DEFENSE THEORY WAS NOT ERROR.

A. *Restriction of Cross-Examination Was Not Error.*

The cross-examination (1) was beyond the scope of the direct examination, (2) was on immaterial and irrelevant matters and (3) was merely supplementary to other cross-examination. Restriction of such cross-examination was proper.

B. *Exclusion of Evidence Was Not Error.*

The excluded evidence was (1) irrelevant, (2) immaterial and (3) merely cumulative to other evidence in the record. The exclusion, therefore, was proper.

C. *Requirement of Written Offer of Proof Was Not Error.*

Such procedure has been approved previously by this Court.

II.

THE COURT'S COMMENTS TO THE JURY WERE NOT ERROR.

A. *No Objection Was Made to the Comments.*

Since no objection was made during the trial, the Court's remarks must be plain error to constitute a ground for reversal.

B. *The Comments Were Not Error.*

Language similar to that used by the trial judge has been held not to be error in other cases, much less plain error.

III.

THE VERDICTS WERE NOT CONTRARY TO THE LAW OR
TO THE EVIDENCE.

A. *Count One Was Not Barred by the Statute of Limitations.*

The indictment was returned well within the five year period of limitations provided by 18 United States Code, Section 3282; further, this contention concerning the statute of limitations cannot be raised for the first time on appeal.

B. *The Two-Witness Rule of Perjury Does Not Apply to Obstruction of Justice Prosecutions.*

C. *There Was Sufficient Evidence to Sustain Conviction on Counts One and Two.*

1. Insufficiency of the evidence should not be raised for the first time on appeal.

2. Proof of appellant having knowingly committed perjury was overwhelming.

D. *There Was Sufficient Evidence to Sustain Conviction on Count Three.*

1. It is not necessary to prove that appellant endeavored to influence a "witness."

2. Mrs. Dutcher was such a "witness."

3. No variance occurred.

4. Obstruction of justice may occur in civil cases.

ARGUMENT.

I.

Limitation of the Defense Theory Was Not Error.

A. Restriction of Cross-Examination Was Not Error.

The denial by the trial court of the right to make extended cross-examination of Russell Anderson concerning the details of appellant's duties with Builders Control Service is contended to be reversible error. A typical question on cross-examination was as follows:

"Do you recall telling Mr. Fry at about the time this trip was made by Mr. Roberts on the Valco deal, that Roberts took someone from the administration over to F. H. A., and received verbal assurance that a portion of the closing could safely occur after May 31, provided only a few days were involved?" [R. 105].

The quoted question goes far beyond the scope of direct examination, for nothing was brought out therein about appellant's duties with Builders Control Service, much less about his trips to various cities or other details of his employment [R. 47-52, 82-83]. Cross-examination outside the scope of the direct examination is properly restricted.

Richman Bridgman v. United States, 183 F. 2d 750 (9th Cir. 1950).

Relevancy of this and other questions relating to the precise details of appellant's duties could have had little probative value in determining whether such duties were performed pursuant to a *written* contract. The Government freely conceded that appellant was employed by and performed duties for Builders Control Service, the sole contention of the prosecution being that appellant had

no written contract [R. 110-111, 272]. Defense counsel readily admitted that this was the sole issue [R. 41-42]. Certainly if the cross-examination was on irrelevant matters, no error was committed in restricting such cross-examination.

D'Aquino v. United States, 192 F. 2d 338, 371 (9th Cir. 1951), cert. den. 343 U. S. 935.

However, even if it be said that the matters embraced in the excluded questions had some slight tendency to prove the existence of appellant's alleged written contract, the materiality thereof was greatly outweighed by the tendency to confuse the jury and was, therefore, properly excluded. As was stated in *Bateman v. United States*, 212 F. 2d 61, 67 (9th Cir. 1954):

"The excluded evidence would have opened up collateral issues tending to delay and unduly burden the progress of the trial."

In any event, the cross-examination was allowed to probe the general nature of appellant's work [R. 98-100]; thus, no prejudicial error resulted from limitation of further remotely material questions which were merely cumulative in effect.

Bateman v. United States, *supra*.

B. Exclusion of Evidence Was Not Error.

The next contention is that error was committed by the exclusion of appellant's testimony regarding his activities with Builders Control Service. The minute details of appellant's duties were quite immaterial, likely to mislead the jury as to the actual issues of the case and thus were correctly excluded under a proper exercise of the

trial court's discretion. In *Schindler v. United States*, 208 F. 2d 289 (9th Cir. 1953), it was stated, as to similarly immaterial evidence:

"Its relevancy, if any, was too slight to render its exclusion prejudicial. The primary tendency of the excluded material was to clutter up and confuse the record, and we think the exclusionary ruling was well within the discretion of the trial judge."

Any help to the defense case that could have been gained by testimony regarding the type of work performed for Builders Control Service was fully given when the trial court allowed the general nature of each project upon which appellant worked to be explained to the jury [R. 272, 274-277]. The excluded testimony consequently was merely cumulative and was properly denied admission.

Wolcher v. United States, 218 F. 2d 503, 509 (9th Cir. 1954).

Appellant now vigorously asserts that he was prejudiced by the Court's remark and ruling that "you have gone far enough, Mr. Lambeau" [R. 277]. Yet it is interesting to note that this very remark was invited by defense counsel when he stated to the Court, "I shall rely on you to stop me when you think I am going too far" [R. 272].

Appellant's half-hearted contention that defense Exhibit C was improperly denied admission into evidence is rather thoroughly answered (1) by its failure to be identified [R. 138] and (2) by the failure of the defense to reoffer the exhibit after the Court's request that it be further identified [R. 137-138].

C. Requirement of Written Offer of Proof Was Not Error.

With respect to the Court's requirement that there be a written offer of proof, it is difficult, indeed, to find prejudice to appellant resulting therefrom. The Court's request came, not during the middle of a session, but at the very end of the first day of the four-day trial [R. 150]. Further tedious argument before the jury was saved by this requested procedure, which apparently was approved by this Court in *Shreve v. United States*, 103 F. 2d 796, 807 (C. C. A. 9, 1937):

"The Court very properly refused to permit appellants' attorney to state what he proposed to prove in the presence of the jury. Nor was it necessary to excuse the jury and delay the trial to permit the offer to be dictated to the reporter. The Court granted permission to counsel to reduce the same to writing and file it with the Clerk of the court. This was done, the contents of this paper were transcribed into the bill of exceptions and we fail to see in what manner this procedure violated any of appellants' rights."

II.

The Court's Comments to the Jury Were Not Error.

The trial commenced on January 10, 1956, and was submitted to the jury at 11:35 a. m., January 13, 1956 [R. 478]. At 5:15 p. m., January 13, the jury asked the Court the following question:

"The Foreman: Your Honor, the jury would like the court's opinion whether it is possible to agree on two counts and have a final disagreement on a third count?

The Court: As I understand the law the jury may" [R. 479].

Apparently the only coercive effect that could have been exercised by the Court was over the third count as to which the jury was in disagreement, since the allegedly coercive statement came after the above-quoted discussion. The jury returned a verdict of guilty on all three counts at 7:45 p. m., January 13, 1956 [R. 480-481].

A. No Objection Was Made to the Comments.

No objection was made by defense counsel to the Court's remarks now contended to be coercive. Appellate courts have held that the propriety of allegedly coercive remarks will not be reviewed unless objection is made thereto, on the quite valid principle that had objection been made in the Court below, the error might have been cured by the Court itself. *Campbell v. United States*, 221 Fed. 186 (C. C. A. 9, 1915), states at page 188:

"The trial commenced September 20, 1912, ending with the return and entry of the verdict of the jury seven days later, after deliberating 48 hours. Three times they returned into court for further instructions; on the third occasion the foreman saying that the jury was unable to agree. The court, however, directed them to consider the case further. The jury having finally returned a verdict of guilty, one of the points urged on behalf of the plaintiff in error for a reversal of the judgment is that such verdict was coerced by the court. There is no basis in the record for such a contention, *especially in view of the fact that no objection was made by the defendant to the action of the court* in directing the jury to further consider the case. The defendant was evidently then willing to take the chances of a verdict in his favor, and cannot now be heard to complain of the result on that ground" (Emphasis added).

In *C. I. T. Corporation v. United States*, 150 F. 2d 85, 91 (C. C. A. 9, 1945), it was urged that the Court erred by reason of its having told the jury late Saturday night that it would not be able to re-read, as requested by the jury, an instruction until the following Monday.

“Thereafter, the court directed the bailiff to advise the jury that it was not necessary for it to continue its deliberations throughout the night or Sunday, but that it might if desired, retire to bed and await the giving of further instructions.”

Approximately 40 minutes later the jury arrived at a verdict. The Court stated:

“No objection to the above proceedings, or to any part thereof, was made by any counsel in the case.

“It is obvious that the money-lenders counsel may be deemed to have thought it of no advantage to his client to have the instruction re-read. We consider such claim to error, not excepted to, only ‘far enough to see that there has been no miscarriage of justice.’ *Giles v. United States*, 9 Cir., 144 F. 2d 860-861.

* * * * *

“There was no reversible error in advising the juror that he would have to wait until Monday to have an instruction reread.”

The experienced trial judge in the instant case gave defense counsel full opportunity to make known any objections or comments with respect to the remarks now labeled for the first time oppressive:

“The Court: Is there any objection as to the comments of the court just now?”

Defense counsel not only made no objection, but expressed his approval as follows:

“Mr. Lambeau: I believe it is all right” [R. 480].

It is doubtful that this Court will lend validity to this novel and somewhat ungentlemanly procedure of attacking trial court actions in which appellants concurred. A reversal of the trial court on this point must necessarily involve a utilization of Rule 52(b) Federal Rules of Criminal Procedure. Appellee leaves trustfully the application of Rule 52(b) in this case "to the good sense and experience of the judges." *Herzog v. United States*, F. 2d (9th Cir. 1956).

B. The Comments Were Not Error.

Clearly, no "miscarriage of justice" or "plain error" resulted from the remarks of the trial court below, as they were not error at all.

Similar remarks, even where objected to, have been made in other cases and have been held not to be error. In *Smith v. United States*, 188 F. 2d 969, 971 (9th Cir., 1951), almost identical remarks of District Judge Ben Harrison were alleged to be coercive. In that case Judge Harrison stated, *inter alia*,

"I have instructed the bailiff to provide you with dinner if you haven't arrived at a verdict by 5:20. If you arrive at a verdict after that and I can get in the building I will be here to receive it, but I am not going to put myself in the same position that Judge Speakman is in by climbing stairs at night. If I can get an elevator I will receive your verdict up to 9:00 o'clock. If you haven't arrived at a verdict by that time, comfortable quarters will be provided for you in a hotel."

Although other remarks of the Court were made in the *Smith* case (not present herein) which inclined this Court to consider the trial judge's remarks carefully, the opinion nevertheless stated:

"We find no substantial threat of hardship in the remarks of the Judge as to his availability to receive a verdict in the evening and as to the provision of comfortable quarters in the event that the jury had not agreed by 9:00 p. m."

In *United States v. Commerford*, 64 F. 2d 28, 30-31 (C. C. A. 2, 1933), the following statement of the trial judge was alleged to be coercive:

"I have called you in, gentlemen, to tell you that I think you ought to make every possible effort to come to an agreement at least upon some of the charges, one or more, and to make all of the progress you can towards that end. In the event that you can not, it will be necessary that you be taken up to the hotel for the evening, and resume your deliberations in the morning."

The appellate court stated:

"We think this instruction to the jury was eminently fair and considerate * * * All that was said and done was intended to be of assistance to the jury and to provide for their rest during the night if they failed to agree and for their further deliberation in the morning. No suggestion was made as to the verdict that the jury should return. The court's advice as to the advisability of the attempt to reach an agreement was proper. Indeed, it was the duty of the judge. *Allen v. United States*, 164 U. S. 492 * * *."

In *Ammerman v. United States*, 262 Fed. 124, 126 (C. C. A. 8, 1919), the following statement of the trial judge was alleged to be coercive:

“Now, in criminal cases in this court we follow the common law practice of keeping the jurors all together until the jury have agreed; but the Marshal will endeavor to provide you a place to sleep tonight, so as not to keep you in the jury room. * * * When you go to the jury room, if you agree on a verdict this evening—it is now a little after ten o’clock—if you want to take a ballot and see if you can agree within the next half-hour, we will be ready to receive your verdict, and that will release you all. If you should not agree, we will have to keep you on hand, and you will continue to deliberate in the morning.”

The appellate court stated briefly:

“This does not approach coercion.”

It similarly may be said of the instant trial court’s remarks.

III.

The Verdicts Were Not Contrary to the Law or to the Evidence.

The third argument made by the appellant apparently consists of the following separate allegations:

- (A) Count One of the indictment was barred by the statute of limitations.
- (B) The “two-witness” rule of perjury applies to obstruction of justice prosecutions.
- (C) The Government failed to prove that the appellant *knowingly* committed perjury.
- (D) There was insufficient evidence to support Count Three.

A. Count One Was Not Barred by the Statute of Limitations.

18 United States Code, Section 3282, provides a five year statute of limitations for offenses committed prior to September 1, 1954, if such offenses were not barred prior to said date. Inasmuch as the instant offenses were not barred on August 31, 1954 by the three-year limitation in former Section 3282, the five year period in the new section applies thereto. Thus, Count One of the indictment, brought on October 12, 1955, was not barred.

No objection having been made at the time of trial as to the statute of limitations question, the point cannot be raised now. Rule 12(b)(2), Federal Rules of Criminal Procedure, Title 18, United States Code, and see *Caywood v. United States*, 232 F. 2d 220, 229 (9th Cir. 1956).

B. The Two-witness Rule of Perjury Does Not Apply to Obstruction of Justice Prosecutions.

The appellant's contention that the "two-witness" rule of perjury applies to obstruction of justice prosecutions is completely answered by *Catrino v. United States*, 176 F. 2d 884, 888 (C. A. 9, 1949). It was therein held that "one . . . witness, if believed, was sufficient to convict of the crime of obstruction of justice." The trial court so instructed the jury [R. 472]. Nor did the Court err in submitting the case to the jury, as the testimony of the one witness Dutcher as to appellant's solicitation of her to commit perjury [R. 180-226, 375-384] would be sufficient to convict, if believed by the jury.

C. There Was Sufficient Evidence to Sustain Conviction on Counts One and Two.

The next contention of the appellant is that the appellee did not prove beyond a reasonable doubt that the appellant did not believe in the falsity of his prior testimony.

1. SUFFICIENCY OF THE EVIDENCE SHOULD NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

This contention involves the attacking of the sufficiency of the Government's evidence, a point which was not raised in the trial court, as no motion for judgment of acquittal, as provided by Rule 29, Federal Rules of Criminal Procedure, was made. The general principle is that one is not allowed on appeal to attack the sufficiency of the evidence presented to the trial jury unless a motion for judgment of acquittal previously has been made and the issue presented to the trial court for its determination.

Mitton v. United States, 83 F. 2d 278 (C. C. A. 9, 1936), and see cases cited therein;

Moomaw v. United States, 220 F. 2d 589 (5th Cir. 1955);

Mitchell v. United States, 221 F. 2d 554 (8th Cir. 1955), cert. den. 350 U. S. 832.

2. PROOF OF APPELLANT HAVING KNOWINGLY COMMITTED PERJURY WAS OVERWHELMING.

In order to show that no miscarriage of justice occurred in the trial, a portion of the evidence bearing upon appellant's lack of belief in the truth of the perjurious statements will be reviewed. First, however, it must be remembered that the only evidence as to appellee's actual be-

lief is not his own declaration of innocence. This point was well made in *United States v. Remington*, 191 F. 2d 246 (2d Cir. 1951), wherein it was stated, at page 249:

“ . . . [T]he peculiar rule concerning proof in perjury cases . . . requires ‘direct’ proof of the crime by two witnesses who testify that the accused violated his oath, or ‘direct’ proof by one witness plus corroborating circumstances. Since the crime of perjury consists in the contradiction between the accused’s oath and his belief, the only ‘direct’ evidence of his guilt would seem to be his own declarations of his belief . . . But . . . it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused’s state of mind that must be proved by ‘direct’ evidence. And this view is confirmed by Chief Justice Vinson’s opinion in *American Communications Association v. Douds*, 339 U. S. 382, 411 . . . where it is said: ‘ . . . While objective facts may be proved directly, the state of a man’s mind must be inferred from the things he says or does . . . False swearing . . . must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind . . . ’

“Hence, the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses must testify to some ‘overt act’ from which the jury may ‘infer’ the accused’s actual belief.”

Thus the inquiry herein must be to determine whether there was sufficient evidence from which the jury could have inferred that the appellant did not believe his testimony in the civil action to be true, and not merely whether

the appellant has consistently stated to the world that he did not commit perjury.

The two counts of perjury involved substantially the same statement made by the appellant on two different occasions. Count One charged, in essence, that on September 8, 1952, in a deposition in the civil action brought by appellant against the Builders Control Service, appellant falsely deposed under oath that he had entered into a *written* contract with Builders Control Service in February, 1948 [Clk. Tr. 2-5]. Count Two charged, in essence, that on October 5, 1954, appellant falsely testified under oath at the time of the civil trial that Russell M. Anderson had signed the said contract on behalf of himself and Builders Control Service [Clk. Tr. 5-10].

Russell M. Anderson testified that no such contract, written or oral, was entered into [R. 49-50, 83]. In addition to this witness' testimony, the following evidence was before the jury:

1. In the said deposition of September 8, 1952, appellant stated that he had checked with Rafael R. Gonzales, Comptroller of Builders Control Service during the period in question, to see that each of the "credit memoranda" had been entered on the books of the company [R. 119-121]. Appellant had alleged that these credit memoranda had been given him at various times and in various amounts as indicia of the money owed him for his services to the corporation [R. 58-76].

Mr. Gonzales testified in the trial below that he never discussed with appellant any credit memoranda—never credited any sums to the appellant on the books of the corporation—never saw any contract pertaining to appellant, although he reviewed all contracts of the corporation in the course of his duties [R. 122-123].

2. In the same deposition, appellant stated that he had discussed his contract with Verle Fry who was the executive vice-president of Builders Control Service during the period in question. Appellant further asked him for the return of his file containing the contract [R. 126-127].

Mr. Fry testified that there was no written contract between the corporation and appellant; that appellant never asked him for the return of his contract or files; that they never discussed any credit memoranda [R. 128, 130-131]. The only discussion of any contract, according to Fry, was held five months after appellant's termination of employment by Builders Control Service at which time appellant told him that unless he was paid a substantial sum of money, he would file a law suit versus Builders Control Service for \$350,000.00 which the corporation could not stand because of the ruinous effect on its financial standing [R. 134].

3. Betty Jean Vokes, former secretary for Builders Control Service, testified that during January or February, 1951, appellant requested her several times to testify that she had seen a written contract in his file at Builders Control Service, which she had maintained [R. 168], although she had informed him that she had seen no such contract and that it would be perjury for her to so testify [R. 163-164, 166-167]. Appellant on these occasions offered her a new car or a fur coat and favorable business connections for her husband if she would testify as requested [R. 164-166, 168, 173].

4. Alice White Craver, also a former secretary of Builders Control Service, testified that she had no recollection of typing any written contract between appellant and Builders Control Service but that in 1952 appellant

had requested her to so testify and asked her to come to work for him at any salary she chose in order that she might remember more about his contract with Builders Control Service [R. 179].

5. Appellant told Mrs. Vokes and Mrs. Craver differing versions as to the disappearance of appellant's written contract [R. 164, 178]. Not only did these versions differ from each other but also from the version appellant related at the time of the trial [R. 279-281].

6. Gladys Dutcher testified that she prepared, at appellant's request and under his direction, two letters falsely stating that she had seen a written contract and credit memoranda between appellant and Builders Control Service [R. 183-185, 188, 194]. She further testified that she had told appellant she had never seen such a contract or credit memoranda [R. 194, 197, 201].

In Los Angeles, during May, 1954, appellant requested her to testify in a forthcoming deposition in the civil action to the effect that what was stated in the said two letters regarding the contract and credit memoranda was true [R. 199-201]. Tape recordings of Mrs. Dutcher's and appellant's conversations, Government's Exhibits 14, 15, 16, 17 [R. 367], were introduced in evidence. The incriminating nature of these conversations is readily apparent and the recordings completely substantiated Mrs. Dutcher's testimony [R. 327-340, 343-348]. Although appellant denied participating in such conversations as recorded [R. 352], it is interesting to note his spontaneous reaction to the playing of one of the taped conversations:

"You mean she had a recorder hidden in my car?"
[R. 349].

7. Thomas J. Lawless, originally called as a defense witness [R. 265] testified that he had seen certain papers which appellant represented to be a written contract of employment between himself and Business Control Service and various credit memos representing amounts of money owed appellant by Builders Control Service [R. 387]. However, these were shown to Lawless by appellant in 1953 [R. 387]. Mr. Lawless was certain of this fact since he did not meet appellant until 1953 [R. 265, 387, 392-393, 395, 400, 419]. Appellant on the other hand contended that his contract and credit memoranda were taken and withheld permanently from him in 1950 [R. 76, 280]. Consequently, the documents shown Lawless presumably were forgeries. It may be inferred that similar documents shown defense witnesses in 1950 [R. 239, 258] were likewise forgeries.

Further, appellant obtained an affidavit [Deft. Ex. F; Pltf. Ex. 18] from Lawless to the effect that he had so seen such a contract and credit memoranda. The date on the affidavit of his having so seen them was in obviously different type, however, and Lawless testified that such date was false and had been inserted without his knowledge [R. 265, 388, 390].

8. Appellant admitted signing Government's Exhibit No. 12, dated June 16, 1948, which contained a statement that he had not signed a contract with Builders Control Service, and that his salary was \$3600 a year [R. 317-318].

9. Appellant borrowed money from Builders Control Service at the time he allegedly was being paid about \$160,000 per year and repaid this loan after he had been fired, at which time the company allegedly owed him \$477,-805 [R. 130, 320-321, 324-325].

The above evidence provides overwhelming proof of the falsity of the defendant's testimony that there was a written contract and credit memoranda, and unmistakably shows the lack of appellant's belief in his own assertions that such documents were in existence.

D. There Was Sufficient Evidence to Sustain Conviction on Count Three.

1. IT IS NOT NECESSARY TO PROVE THAT APPELLANT ENDEAVORED TO INFLUENCE A "WITNESS."

The contention of appellant in this respect is that it was not proved that he endeavored to influence a prospective *witness*, and thus it cannot be established that the crime of obstructing justice occurred.

First, the appellant was not *charged* with having endeavored to influence a prospective witness, but rather with having corruptly endeavored to "influence, obstruct, and impede the due administration of justice . . ." [Clk. Tr. 10-11]. This fact alone should put to rest the contention that because Mrs. Dutcher was not a "witness", the Government's proof failed. Further, Count Three clearly states an offense, as it is laid within the language of 18 United States Code, Section 1503, which reads, in pertinent part:

"Whoever corruptly . . . endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

Moreover, the cases leave no room for doubt that obstruction of justice may occur even though no witness

is sought to be corruptly influenced. This was early held in *Wilder v. United States*, 143 Fed. 443, 440 (C. C. A. 4, 1906):

“If the strictest and narrowest possible meaning were given the word ‘administration’, as used in this statute, the inferences forbidden would be confined to those which obstruct or impede the judge, the jurors, counsel, the marshal, and possibly witnesses. But such obstructions are provided for in the first part of the statute, and in using the different and broader language employed in expressing the latter clause of the statute it seems clear that the intent was to embrace obstructions other than those which were dealt with in the first clause. . . . The first clause of section 5399 sufficiently provides for influencing, intimidating, or impeding witnesses (who have been summoned or otherwise designated as such) and officers of the court while actually in the discharge of their official duties. If those acts which may obstruct or impede the administration of justice, and which are not embraced within the previously used language, are held not to be embraced within the meaning of the latter clause of section 5399, Congress has wholly failed to forbid such acts, and has uselessly and confusingly twice expressed the same intent in different language.”

Anderson v. United States, 215 F. 2d 84, 87-88 (6th Cir. 1954);

United States v. Polakoff, 121 F. 2d 333 (C. C. A. 2, 1941);

Bosselman v. United States, 239 Fed. 82 (C. C. A. 2, 1917).

See also:

Catrino v. United States, 176 F. 2d 884, 887 (9th Cir. 1949).

2. MRS. DUTCHER WAS SUCH A WITNESS.

Second, the evidence showed that Mrs. Dutcher was to be a witness in the civil action, as appellant well knew, since he requested her to testify therein falsely for him [R. 199-200, 213-214, 326-328, 331]. The fact that she may not have been subpoenaed is immaterial since she intended to give testimony which fact appellant knew. Such circumstances make Mrs. Dutcher a "witness" within the meaning of the statute. As was succinctly held in *Walker v. United States*, 93 F. 2d 792, 795 (C. C. A. 8, 1938):

"It was not necessary to prove that she had been subpoenaed. She was such a witness if she then intended to testify on the trial of the case then pending in the District Court."

Appellant cites as supporting his position, *Smith v. United States*, 174 Fed. 351 (C. C. A. 8, 1921). It is interesting to note, however, the holding of the Court at page 353:

"Many, probably a majority, of all the witnesses who testify in courts of justice, do so without the service of a subpoena . . . They, however, are not less witnesses than those who testify under subpoenas. The corrupt threatening or forceful influencing or intimidation of witnesses who testify without subpoenas is not less pernicious than that of witnesses under orders of the court, and a construction which would limit the protection of this section to the latter class of witnesses is too narrow and unreasonable. The terms of the statute, the evil it was enacted to prevent, and the protection it was intended to provide, leave no doubt that under its true interpretation each of those who are subpoenaed

to come, of those who are called and accept the call to come without subpoenas, of those who are prompted to come by their interests, *of those who expect to come, and of those who are selected and expected to come to testify* in any case in any court of the United States, falls within the class described by the terms ‘any witness, in any court of the United States,’ in the section under consideration” [Emphasis added].

3. NO VARIANCE OCCURRED.

The point might be raised in oral argument by appellant that if the evidence did show Mrs. Dutcher to be a “witness”, then the indictment did not charge appellant with corruptly endeavoring to influence a witness, but rather with corruptly endeavoring to obstruct justice, and thus failure of proof or material variance occurred. Such a possible argument will be met in advance.

The proof conformed exactly to the pleading, since it was proved, as charged, that appellant sought to have Mrs. Dutcher falsely testify. The manner of pleading is quite proper and states an offense, since obstructing justice obviously occurs by the influencing of a witness. In *Anderson v. United States*, 215 F. 2d 84, 87-88 (6th Cir. 1954), the indictment similarly charged appellants with having corruptly endeavored to impede the due administration of justice by agreeing to alter the testimony of two witnesses in a pending federal case. The appellate court therein held:

“The language of the indictment charging the offense is in strict conformity with the definition of the offense in the statute.

* * * * *

“It would seem easy to understand in the context what was meant by a corrupt endeavor to impede the due administration of justice. There can be no reasonable doubt that an effort to alter testimony of witnesses for a corrupt purpose would plainly be an endeavor to impede the due administration of justice. We think the implication so plain that the point need not be labored.”

4. OBSTRUCTION OF JUSTICE MAY OCCUR IN CIVIL CASES.

The next contention of appellant is contained at lines 16-18, page 16 of his brief:

“Also, until the government showed that she was or would be a witness on the issues of the perjury, there was nothing to influence or instruct (*sic*) a ‘witness’.”

The appellee may well misunderstand this argument, but if what is meant by it is that obstruction of justice may occur only in criminal cases, the argument is poorly founded. As was held with respect to the predecessor statute to 18 U. S. C. Section 1503, in *Wilder v. United States*, 143 Fed. 433 (C. C. A. 4, 1906):

“The contention that a violation of Section 5399, consisting of obstructing the administration of justice in a civil litigation, between private citizens in a federal court, is not an offense against the United States, need not be discussed at any length. One of the sovereign powers of the United States is to administer justice in its courts between private citizens. Obstructing such administration is an offense against the United States, in that it prevents or tends to prevent the execution of one of the powers of the government. [citing cases].”

Sneed v. United States, 298 Fed. 911, 912 (C. C. A. 5, 1924), also so held:

“That the United States was not a party to the civil cause in which Patterson was a juror makes no difference. The justice being administered was the justice of the United States, and its purity and freedom is to be protected by federal law.”

Conclusion.

The record in this case plainly shows that no error occurred in the trial below. The limitation of the defense as to the minutiae of appellant's duties with Builders Control Service was an entirely proper exercise of discretion in eliminating immaterial matters likely to confuse the jury and delay the trial. The arguments that the District Court's comments to the jury were coercive and that the evidence was insufficient to support the verdicts border on the specious when the record and the applicable law is examined.

It is a rare trial, however, in which some error, of varying degree, does not arise due to the heat of conflict or necessity for instantaneous rulings. Consequently, this Court may find that error existed in the proceedings below. Nevertheless, the clear evidence of appellant's guilt unequivocally shows that no miscarriage of justice or denial of fair trial resulted therefrom.

Respectfully submitted,

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